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SUPREME COURT OF THE UNITED STATES

October Term, 1996

DAVID GOLIA PALADIN,

Petitioner,

v.

FRANK FINNERTY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

David Golia Paladin
Pro Se
P.O. Box 66
Mineola, New York
11501

February 28, 1997

158 pp

QUESTIONS PRESENTED

In this denial by the federal courts to reverse two non disciplinary letters of caution issued administratively by the Grievance Committee for the Tenth Judicial District of the Appellate Division, Second Department, of the Supreme Court of the State of New York (hereinafter referred to as the grievance committee or committee), the procedures and rules set forth by the Second Department were insufficient to protect an attorney's right to a fair hearing and to fundamental fairness in attorney disciplinary proceedings.

This case appears to be one of first impression in raising the following issues under the First, Sixth and Fourteenth Amendments of the Constitution of the United States:

Issue 1: Whether an attorney who is a peer review defendant in a disciplinary matter is entitled to the same rights to a defense as other attorney defendants both within the same Judicial Department in which the attorney has an office, as well as within the three other Judicial Departments within the State of New York.

New York State is the only state in the country that has an attorney disciplinary system with four different sets of rules, administered by four intermediate appellate courts. This system has created a class of attorneys in Petitioner's Second Department different from those attorneys whose offices are situated in the First, Third and Fourth Departments within the State of New York. This is in violation of Petitioner's civil rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution--whether considered under a rational basis standard, an intermediate scrutiny standard, or under the attorney disciplinary "quasi criminal" strict scrutiny standard.

Issue 2: Whether peer review in attorney disciplinary matters must comport with due process, with free speech to speak with a client or to question the instant lack of due process, and with the right to confront one's accuser. Whether disciplinary procedures must be

based on rules that set forth clear and objective standards with regard to notice, materiality, standards of proof, impartiality, and meaningful judicial review.

If the District Court's decision is allowed to stand, the Second Department grievance committees in New York State can now issue letters of caution without notice on the grounds that a justiciable "property right" is not effected. This flies in the face of their "policy" of giving notice, and flies in the face of their "policy" of providing "due process." Further, it invites abuse by keeping such letters on permanent file, then using them in determining future discipline. Finally, the objective implementation of extant rules in the instant case is not rationally related to any legitimate state interest.

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In The

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner David Golia Paladin respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is reprinted as Appendix I. The order of the United States District Court for the Eastern District of New York is unpublished and reprinted as Appendix H.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed December 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, NEW YORK STATE STATUTES AND RULES

The constitution of the United States provides in pertinent part:

Amendment I

Congress shall make no law...abridging the freedom of speech...or the right of the people to...petition the government for a redress of grievances.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...

Amendment XIV, section 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Judiciary Law of the State of New York, Section 90, (Appendix A) provides in pertinent part:

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct...

Pursuant to this provision, separate and distinct attorney disciplinary rules were adopted in each of the four appellate divisions. (Appendices C, D, E, and F)

PRELIMINARY STATEMENT

This is *not* a case about the facts underlying this case--charges relating thereto were dismissed by the committee. (Appendix M) This is *not* a case about the necessity of an effective attorney disciplinary process.

This is a case of first impression about whether attorney disciplinary procedures used in the instant matter, and laws and rules in support of those procedures, violated federal constitutional and civil rights in 1988 and continue to do so today. This is very much a case that questions the current constitutional validity of attorney disciplinary rules in the only state in the country that has four different sets of attorney disciplinary rules. These differences lead directly to confusion and lack of fundamental fairness at the outset of the instant matter, and to sanctions that vary depending on which of the four sets of rules is applied.

STATEMENT OF THE CASE

Petitioner David Golia Paladin, a New York attorney in good standing, was assigned by the New York State Supreme Court, Appellate Division, First Department, to represent an indigent defendant in a 1986 appeal from a parole revocation hearing. In early 1987 the defendant filed a professional complaint against Petitioner in the Third Department. Petitioner was unable to have new counsel assigned due to First Department conflict rules that would have jeapordized the defense, thus Petitioner continued with

representation. The Third Department transferred the complaint to the First Department. The First Department transferred the complaint to Second Department. First Department rules continued to hindered assignment of new counsel without disclosure by Petitioner that would risk destruction of grounds for the underlying parole revocation appeal. Petitioner continued with representation through November, 1987 when client thanked him and asked for his appeal to be withdrawn. In 1988 the complaint was dismissed by the New York State Grievance Committee for the Tenth Judicial District, Second Department.

In November 1988 the committee, without notice, issued a first letter of caution that Petitioner had threatened his client for filing a grievance. In fact, the client never raised the charge, and until the instant case the committee refused to disclose the source of the charge, in violation of Petitioner's Sixth Amendment right to confrontation.

When Petitioner brought the lack of notice to the committee's attention, a *sua sponte* complaint on an unrelated matter was raised. (Appendix K) Petitioner was then allowed to submit an explanation concerning the first letter of caution to the same committee which then reaffirmed the first letter of caution--which raised the issues of fundamental fairness of the tribunal and lack of judicial review.

Petitioner did not request that the committee reconsider the second letter of caution because the original information submitted to the committee prior to its sanction was unchanged. Subsequent deposition in federal court (Appendix O) of the committee's chief counsel, defendant Frank Finnerty, revealed that if the matter had been re-reviewed by the committee it would have been dismissed. This raised the issue that its purpose was solely to threaten Petitioner for his questioning their lack of notice on issuing the first letter of caution.

Both of those issues--lack of notice and threatening by the committee--in turn lead to Equal Protection claims.

There is no provision in their rules for judicial review of the actions of the committee with regard to letters of caution. The only option is to ask the same committee to reconsider its action and hope that the committee does not recommend increasing the sanction--which they can do and have done--in the process. See, Matter of Holtzman, *infra.*

In 1989 Petitioner's counsel advised him that such letters were not "appealable."

The policy of the committee in the Second Department is to keep such letters on permanent file, and use them in determining future discipline, Anonymous v Grievance Committee, 136 AD2d 344 (1988) at p 346, stated that:

> *[I]n the event that other misconduct is brought to our attention, this LETTER OF CAUTION will be considered in determining the measure of future discipline.* [Emphasis added]

This policy could not be any clearer, and could not conflict more with the notion that letters of caution are not disciplinary in the Second Department and thus do not involve property rights.

Further, the two cases in New York referred to by Respondents that reached a point of judicial review were Anonymous and Taub v. Committee on Professional Standards, Third Judicial Department, 612 NYS2d 272 (1994). They dealt only with free speech as effected by limitations on attorney advertising, they reached split results, their decisions were not reviewable, and the positions of the respondent committees in both was that the respective courts lacked jurisdiction to hear the matters.

In July, 1991 Defendant Guy Mangano, the Presiding Justice and chief administrator of the Second Department, stated in correspondence to New York's then Chief Judge that the Petitioner was afforded "complete due process" in the proceedings surrounding the issuance of the letters of caution. (Appendix N)

In October, 1991, Petitioner filed his complaint in the United States District Court for the Southern District of New York. It was subsequently transferred to the Eastern District and Respondents reduced to those from the Second Department.

On March 22, 1993 the matter was before Hon. Michael Orenstein, US Magistrate Judge, EDNY. Judge Orenstein made the following observations in the colloquy between the Court, Petitioner and Respondent's counsel:

Court at page 11--"You mean I don't get to say whether I threatened my client or not?...I mean I've already been cautioned. *Why would they change their mind*?" [Emphasis added]

Respondent at page 11--[I]f there's a deprivation at all by this letter, there's a post deprivation remedy in giving him the opportunity.

Court at page 12--Does that make, giving someone an unfair trial, does that make it all up? When someone has spent 15 years in jail because of an unfair trial for, -- where their constitutional rights were breached?

Court at page 13--Well when North Carolina inquires--And they tell him that he's been cautioned, and there, you know, and therefore it has an affect on his application for admission in North Carolina, and North Carolina refuses to do whatever they do because of that,--

Court at page 14--So if his license to practice law, in another state, is affected by a lack of procedural due process--OK. Now, isn't it also a proper post procedure, post remedy that he attack these, procedure as unconstitutional?

Court at page 23--OK, you tell me how many other attorneys they've issued letters of caution to for failing to, for paying late...Maybe we ought to find that out in the discovery proceedings, Ms. Olson. *Or did they raise it because of something other, some other reason*? [Emphasis added]

Court at page 25--Mr. Paladin, as a pro se, are you prepared to take case through its course and the attack on the constitutionality of the procedure.

Petitioner at page 25--Yes Judge.

(End of colloquy.)

Petitioner moved for summary judgment in December, 1994.

In March, 1996 District Judge John Gleeson ruled that there were no property rights effected, thus no entitlement to due process. Further, he ruled there was no merit to Equal Protection, First or Sixth Amendment rights.

In July and August, 1996 Petitioner appealed and Respondents replied respectively.

In December, 1996, the Second Circuit, Hon. Dennis Jacobs presiding, affirmed the due process ruling of Hon. John Gleeson. Ignoring Respondents' admission that they failed to properly raise abstention in a timely fashion, the Second Circuit specifically found that there was no failure of due process because Petitioner was free to seek relief in 1988 under Article 78 of the New York Civil Practice Law and Rules. The Court further found that there were no valid Free Speech, Equal Protection and Sixth Amendment claims. (Appendix I)

The Petitioner respectfully excepts for the reasons to follow.

REASONS FOR GRANTING THE WRIT

The New York State attorney disciplinary system is unique in the country. It is authorized by New York Judiciary Law Section 90 to be administered by four intermediate appellate courts which subsequently adopted and continue to use four distinctly different sets of procedural rules that over time have resulted in a patchwork of substantial differences. (Appendix J)

The differences and vagaries of the rules is the reason for the committee's lax conduct and for Petitioner's confusion at the outset of this case, and for the subsequent confusing court decisions. Contrary to the Adopting Order of the Chief Administrative Judge of the Courts for the Unified Court System in New York, the differences in the attorney disciplinary rules continue today and perpetuate the same confusion.

The seriousness of attorney disciplinary sanctions should be dependent on the seriousness of the error, not on the court district in which the issue is raised.

This was clearly acknowledged in the Circuit Court's decision at pages 3 and 4. There it referred to the District Court's denial of "Paladin's request for injunctive relief," and that "the differences in disciplinary rules and procedures among the four departments deprived him [Petitioner] of equal protection.

At the time, and to date, there is no adequate state remedy available. The Respondents admitted to the District Court that they had failed to timely raise the issue of abstention and that "review of the merits of plaintiff's claims may be warranted." (Appendix G) Nonetheless, the Circuit Court at page 4 of its opinion raised the question of why Petitioner did not seek Article 78 relief as to the first amendment issues raised in the second letter of caution.

The Second Circuit stated earlier at page 4 of its opinion that Petitioner "viewed the second letter of caution as retaliation for his having dared to question the first letter of caution." And that this was, in the words of the Court, "nonsense."

With all due respect, it was not nonsense because it in fact accomplished what it was intended to do. This was earlier noted by the Court at page 3 of its decision where it stated: "The Chief Counsel to the Committee indicated at his deposition (Appendix O) that the complaint concerning the failure to re-register would have been dismissed in its entirety if only Paladin had appealed the resulting letter of caution, which Paladin never did." This was also noted by Magistrate Judge Orenstein, *supra*

The real question concerning timeliness of the registration is why did the committee issue the letter in the first place when their counsel already had all the facts in hand that Respondent Chief Counsel Finnerty later stated should have resulted in dismissal of the charge? It would appear as though the Respondents--the committee and its counsel--have failed to maintain an appropriate and fair independence. Logic dictates the real motive of the committee and its counsel collectively was simply to ratchet up more charges.

The issue of fundamental fairness permeates questions about the proceedings in that the vagueness of the committee's rules is such that they claim they operate under the highest standards,(Appendix O) while at the same time the average practitioner is unable to ascertain exactly what his or her rights are under circumstances in which First, Sixth and Fourteenth Amendment rights are being compromised. In fact, the rules are so vague, that even the Respondent Finnerty at deposition had trouble answering questions concerning the standard of proof used or how to define a letter of caution. Subsequent deposition in federal court (Appendix O) of the committee's chief counsel, defendant Frank Finnerty, revealed that if the matter had been re-reviewed by the committee it would have been dismissed

Gentile v. State Bar of Nevada, 111 SCt 2720 (1991) faced this issue of vagueness squarely. Justice Kennedy's statement at page 2722 went right to the heart of the same matter raised in the instant case where in referring to and striking down "Nevada Supreme Court Rule 177" he stated:

> Given the Rule's grammatical structure and the absence of a clarifying interpretation by the State court, the Rule fails to provide fair notice to those to whom it is directed and is so imprecise that discriminatory enforcement is a real possibility.

Second Department rules do not provide for judicial review of letters of caution. In as much as the Presiding Justice of the Second Department, who is also the chief administrative officer of that

Department, has pronounced that the proceedings met due process standards, an Article 78 appeal to the same court that has exclusive jurisdiction over attorney discipline would have been an exercise in futility.

It is error to avoid the issue of Equal Protection. In this application, the somewhat speculative guise of Parratt v Taylor, 451 US 527 (1981) does not control whether equal protection rights exist. In fact here, due process rights--a property interest if you will--exist not just because the Presiding Justice of the Appellate Division, Second Department said they did, (Appendices G and N) but more importantly because there is such a clear violation of equal protection rights.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated the same.

Here, the "threatening" charge was eventually admitted to have been raised by the committee, and raised without notice. The policy of the committee and the Second Department is to provide notice and due process to defendant attorneys within the department. (Appendices N and O) Therefore, not providing the Petitioner with notice and an opportunity to be heard by an unbiased tribunal violated Petitioner's right to equal protection within the department.

The opportunity to "appeal" to the same committee that had *ex parte* already formed an opinion, and to expect them not to be effected by the position they previously took, is an illusory opportunity at best. This was more than shown by the committee's negative determination concerning the registration--it seems apparent that the information provided them did not really matter, in spite of what Mr. Finnerty said to the contrary in his deposition.

At the same time, within the same state, there is a statewide violation of equal protection in that there are three other outcome determinative sets of rules in existence.

In this case the complaint was filed in the Third Department and passed on by the First Department, so that it wound up in the Second Department. The Third Department has a higher standard of proof (clear and convincing) than the Second Department. (Appendix E, 806.4(c)ii) And, the First Department at that time specifically guaranteed notice and an opportunity to be heard before issuance of a letter of caution.(Appendix C, 605.6(d))

Interestingly, at page 28 of their appeal brief, Petitioners state that, "Plaintiff claims that the use of letters of caution by the Appellate Division, Second Department, violates equal protection because the First Department does not issue letters of caution...This is a frivolous claim."

Perhaps though, it might be more correct to postulate that the First Department feels it is really the letters of caution that are "frivolous," to the point that they decided to eliminate them in their entirety.

It is the position of the Petitioner that the Second Circuit and the District Court erred in placing the justification for their findings entirely on a failure to set forth a viable property interest to support a due process claim.

Both courts failed to address the equal protection claims raised by Petitioner other than to state they were without merit. The lack of equal protection of the law in these proceedings is exactly the reason that the committee was able to do what it did, and then subsequently claim they were entitled to do what they did because Petitioner had no due process rights with which to contest their actions.

In light of their policy of notice (Appendix O) and their Presiding Justice's administrative policy of due process (Appendix N) the logic of such reasoning escapes this Petitioner. Nonetheless, the reviewing courts have continued to treat the subject matter itself with great skepticism and expressed a reluctance to conclude that any change is needed in New York's current patchwork of regulations and rules.

The Circuit Court specifically referred to Mildner v. Gulotta, 405 FSupp 182 (EDNY 1974). This was, however, an acrimonious three way split decision of the three judge district court panel based on a concept of abstention and immunity that has since been specifically reversed by the US Supreme Court in Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 US 719 (1980).

The perspective of the courts in the instant case appears to lend unfortunate credence to what Deborah Rhode characterized in her article, "Moral Character as a Professional Credential," Yale Law Journal, Volume 94, Number 3, (1985) where at page 561 she stated:

> *Moreover, once individuals have formed a judgment, they tend selectively to assimilate information that will confirm their original impression. Conflicting data are undervalued, and certain vivid personal information is overvalued. In general, individuals tend to give greater weight to evidence of unfavorable personal attributes than to positive ones, and to assess other individuals on the basis of one salient quality.* [Emphasis added]

She went on to say at page 570 that,

> "As the Supreme Court has long recognized, pursuit of a chosen vocation is one of the core liberties protected by the due process clause of the Fifth and Fourteenth Amendments. [Wilner v. Committee on Character and Fitness, 373 US 96, 103 (1963)] Accordingly, certification and disciplinary procedures must satisfy the requirements of specificity and regularity that give content to those constitutional guarantees." [Footnotes omitted]

The Second Circuit also specifically referred to New York Judiciary Law Section 90 (6), stating at page 3 of their decision that: "Final decisions of the Grievance Committee may be appealed to the Appellate Division..." However that provision only

applies when an attorney is "suspended or removed," it does not apply when an attorney is "cautioned."

The Petitioner flatly states that there is no provision for a "right" to judicial review of letters of caution in the Second Department. The one time it was done, in Anonymous, *supra*, the committee failed to raise the jurisdiction issue on appeal so that the court had to consider the attorney advertising matter, which they then promptly rejected.

The problem of vagueness is not limited to due process concerns. In the instant case, both due process and equal protection violations squarely raise the issue of vagueness from having four different sets of disciplinary rules within the same state.

Deborah Rhode commented succinctly on this issue in her Yale Law Journal article, "Moral Character as a Professional Credential," Volume 94, Number 3, at page 572, where she stated:

> Moreover, the vices of vagueness include not only the absence of notice, but also the absence of constraints on arbitrary government action. Implicit in our concept of ordered liberty is the ideal of a 'government of laws, and not of men.' One primary function of the due process clause is to limit state departures from that ideal. By requiring some specificity in standards, the void-for-vagueness doctrine seeks to restrain erratic and capricious governmental oversight. Given the limitations and expense of ad hoc appellate review, legal mandates must be framed with sufficient precision to afford a certain regularity in administration as well as the 'appearance of even-handed justice.' Such precision also serves to ensure that fundamental policy choices underlying the exercise of state power rest with publicly accountable representatives.

The case of Thereza Imanishi-Kari, Ph.D.,DAB #1582 (June 21, 1996) has some bearing on Petitioner's argument at this point. This case involves due process peer review within the scientific research community as encompassed by the Department of Health and Human Services. This is the somewhat notorious case of alleged

scientific fraud and falsification of research. As it evolved, the case developed a similar tone to the observation of Deborah Rhode in her "Moral Character as Professional Credential" article in 94 Yale Law Journal Number 3, at 561 (1985), which bears repetition here:

> *[O]nce individuals have formed a judgement, they tend selectively to assimilate information that will confirm their original impression. Conflicting data are undervalued, and certain vivid personal information is overvalued. In general, individuals tend to give greater weight to evidence of unfavorable personal attributes than to positive ones, and to assess other individuals on the basis of one salient quality."* [Footnotes omitted, emphasis added]

In other words, one cannot expect a meaningful, fair, and unbiased review from people who have previously formed an opinion.

That is exactly what happened to Dr. Imanishi-Kari when her research was reviewed by the Office of Research Integrity. With regard to the credibility of Dr. O'Toole, the person who first raised the issue of data falsification, the Appeals Board said the following at page 167: "Dr. O'Toole's testimony [was] not credible...question[ing]the accuracy of Dr. O'Toole's memory and her increasing commitment to a partisan stand." That is also what happened to the Petitioner when the Respondents first acted *ex parte* to sanction Petitioner, and then on questioning of Respondent's actions by Petitioner they quickly added the registration charge. Later the Respondents defended themselves and their actions by claiming that Petitioner had a meaningful right to review --what they keep referring to as a "right to an appeal"--if only Petitioner had asked them to reconsider their opinion and reverse themselves. In either case, the access to a fair due process review appeared compromised.

In footnote 4 at page 4 of the Imanishi-Kari decision the Research Integrity Adjudications Panel discusses the abuses of the applicable evidentiary standard by the Office of Research Integrity, stating:

> A shift in burden of proof (as distinct from a burden of going forward) occurs only after a prima facie case is presented, and such a case must itself be made based on reliable, credible, probative evidence. Here, much of the evidence which ORI presented does not meet this test. For the most part, ORI relied on its findings, from which it asked us to draw a particular inference. ORI sometimes failed to prove the factual basis for the inference ORI asked us to draw. Other times, ORI failed to demonstrate that the inference was a reasonable one in light of the proven facts, or failed to show that other equally reasonable inferences, in Dr. Imanishi-Kari's favor, should not be drawn, based on the evidence as a whole.

Real data, subjected to intense levels of scrutiny, might uncover "inexplicable oddities" that would suggest anything the inquisitors and scrutinizers wished it to mean. [Footnote 23, page 14]

> The Secret Service did not have any information about the scientific significance of any of the material they reviewed and hence attributed unwarranted suspicion to characteristics of the data for which there were scientific explanation...However, without interviewing the persons that generated the data or compiled the notebooks, the examiners made assumptions about what would be expected in the notebooks. They operated in an almost complete vacuum of information about the nature or meaning of the research notebooks and data. [Text, page 36]

In other words investigators should not consistently overlook alternative explanation in order to establish a case against a person being investigated, which is exactly what the Respondents did to Petitioner.

The point is that once a peer review group has taken a position, they are no longer neutral. From that time on, they understandably tend to spend all their remaining efforts in justifying and bolstering the correctness of the original position they took. The Respondents' claims that Petitioner, after he has already been placed in an adverse position by Respondents' original decision, could come

back to them and expect them to do anything other than further justify their original position flies in the face of reality.

Similarly, the committee never interviewed Petitioner about what should be in a client letter under the unique circumstances of dealing with a client who had a continuing impulse control disorder and was a violent felony offender and parole violator. The Respondents' claims at this point of there being a meaningful "appeal" available is illusory. There was never a provision in their rules for appeal to a court, and the only review available was really reconsideration by the same people who took the original position of censure, but who now, in addition to no longer being neutral judges, on any reconsideration were free to increase the level of censure as they in fact did in Matter of Holtzman, 78 NY2d 184, (1991). Perhaps this is more an example of personal pique than objective judgment.

This type of position and practice flies in the face of due process fundamental fairness, yet the Second Department has developed a history of interpreting due process in these type of reviews that defies traditional interpretations of what fairness is all about.

In Spevack v. Klein, 87 SCt 625, 630 (1967), Mr. Justice Douglas in his majority opinion commenting on the Fifth and Fourteenth Amendments and whether or not their protection extends to lawyers, stated at page 627:

> ...the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down...Like the school teacher in Slochower..., and the policeman in Garrity..., lawyers also enjoy first class citizenship.

Mr. Justice Fortas concurred stating at page 630 that:

> No more need be said about the right of a lawyer to assert a legitimate defense--criminal or civil--in the same manner as any other citizen has a right to do.

All of this is exactly what Judge Weinstein was pointing to in his stinging dissent in Mildner, (supra), where at page 201 he stated:

> Despite my high regard for New York's tradition in maintaining the high ethical standards of its bar, I reluctantly conclude that its disciplinary procedure is constitutionally infirm in denying attorneys the due process and equal protection guaranteed by the Fourteenth Amendment of the United States Constitution. There is no inconsistency between fair treatment of lawyers and maintenance of the long tradition of their discipline by the courts. There is no good reason why members of the legal profession, who have done so much to protect the constitutional rights of others, should be deprived of justice with due process in hearings and appeals--rights available to all other professionals. As construed by New York courts, the statutory disciplinary procedure, Judiciary Law § 90 is invalid.

Judge Weinstein concluded at page 229 of his opinion stating:

> The New York statutory disciplinary procedure denies accused attorneys due process of law. It permits the court of original jurisdiction to rule without holding a full and fair hearing or stating the reasons for its decision and then fails to provide for an appeal as of right from this determination. When a court has the awesome power of determining the validity of charges affecting an attorney's reputation and livelihood, it must scrupulously adhere to procedural due process. There is a pressing need to protect the public from unethical attorneys, but a state may not in its zeal to discipline them ignore the requirements of the United States Constitution. The law also is unconstitutional in denying attorneys the equal protection of an appeal permitted all other professionals. Section 90 of the Judiciary Law, as interpreted by the New York courts should be declared unconstitutional.

Judge Weinstein took a larger view of all that the system did and the way it operated, and found, without picking apart each nuance [as the Respondents have tried to do in the instant case] that the

overall effect of the way disciplinary committees operated in New York was fundamentally flawed, subject to abuse, and not equivalent to the due process reviews to which all other professions are entitled. The passage of time since Judge Weinstein's opinion has done nothing to improve the state of attorney's rights to due process in Second Department attorney disciplinary proceedings in New York. Indeed, if anything, the procedural and eventually substantive differences among the four departments has become pronounced enough for the State Bar to openly comment on the wisdom of allowing such differences to continue. (Appendix J)

Further, even though this has been recognized as a problem, there is no indication that it has been or will be successfully addressed either legislatively or judicially in New York State unless directed to do so by the highest constitutional authority in the land.

The whole purpose of due process and equal protection is fundamental fairness and equal treatment. Both of these concepts are outcome determinative. If they are not applied at the outset of any proceeding, all that follows is tainted and often becomes a referendum of justification as to why any lack of fairness and equality in the procedures in question really should not matter.

It is like a lyncher saying after a lynching, "Well, he was guilty anyway, and these are all the reasons he was probably guilty."

The Fourteenth Amendment was designed to put laws and reason between passion and mistakes without undue burden on the government. Matthews v Eldridge, 424 US 319 (1976) due process was not too costly nor too cumbersome for Respondents to have provided Petitioner at the outset of the instant case. Everyone else got "notice," and Respondent Presiding Justice Mangano claims to provide due process. It was the clear choice of the Respondents in the instant case to pursue the path they did.

And it begs the ultimate questions--would the result in the instant case have been different if due process had been followed from the outset and the committee's counsel had simply picked up the phone and called Petitioner? Would the result have been different if all

four Appellate Divisions had the same standard of proof, had eliminated letters of caution, had a meaningful right to appeal, had the same conflict rules for assigning new counsel to a criminal matter and had procedural rules as clear as presently exist in the First Department? If so, then the law that currently allows such differences to have developed runs afoul of Amendment Fourteen and must fall.

How can the rights, obligations and clarity of procedure be the same in New York attorney disciplinary proceedings when just on length alone, the First Department rules in Appendix C are several multiples larger than the Second, Third and Fourth Department rules in Appendices D, E, and F respectively?

In commenting on the Imanishi-Kari situation, the New York Times, in an article titled, "Inquiry Lacking Due Process," June 25, 1996 page C3, stated:

> Although [ORI] was to serve the role of prosecutor in cases that could effectively banish scientists from their profession, it was designed by scientists who wanted to keep lawyers and legal procedure out of their affairs. Warnings of the hazard of leaving out due process procedures were ignored.
>
> When the office opened for business, those it investigated had no right to see the evidence against them, to cross-examine witnesses, to bring their own witnesses or even to get a list of the charges against them, which tended to change as the investigation wound on. There was also no right of appeal.
>
> Dr. Bernadine Healy, a former director of the National Institutes of Health who had insisted on formation of the appeals board [Departmental Appeals Board/Research Integrity Adjudications Panel], said she was horrified by the workings of the office [ORI/OSI] "*...It had become obvious that this was a totally polluted system where these scientists got behind closed doors and worked out their venom, taking down their colleagues. It was a star chamber, a hideous travesty of justice...In fact,' she said, 'the fraud, the abuse, the dishonesty*

was in the process. It was," she said, "*the process that was contaminated*" [Emphasis added]

The Office of Research Integrity, as it was originally known from George Orwell's novel *1984*, and now known as the Office of Scientific Integrity, bears numerous and striking comparison to the grievance committee with which Petitioner has been involved for the past ten years. The committee's procedural rules in the Second Department are just as vague about how they operate and how a defendant is to proceed. The lawyers who run the committee have, with the apparent blessing of the Appellate Division, Second Department, taken due process and exempted themselves from its very requirements, and in fact in this appeal are hiding behind the obtuse and bizarre argument that no notice is required now in the issuance of letters of caution because there is no Goldberg v. Kelly 397 US 254 (1970) property right at stake. To paraphrase the Circuit Court, this argument is the real "nonsense."

The US Supreme Court addressed this same issue of vagueness in Gentile, *supra*, striking down provisions of the Nevada Bar code that were so vague as to invite "discriminatory enforcement."

In the present case, the speech in question had two parts, the first was a confidential and privileged communication with Petitioner's client, warning him of the precarious position he was risking by filing a grievance against an attorney trying to protect his client's ongoing case before the parole board, and the second was Petitioner's questioning of the committee's lack of due process in issuing a sanction for such communication without any notice or opportunity to be heard. The interference by the committee with an ongoing attorney-client relationship was clearly raised as an issue at page 33 of Petitioner's district court brief, and again at page 23 of Petitioner's Second Circuit brief.

"Quasi-property" rights were not considered by the Second Circuit panel because such rights were allegedly not raised before the District Judge. The fact is that the exact words "quasi property" were not used in the papers and argument submitted to the District Judge.

However, the elements were all there--"quasi-criminal"--and were all argued. Specifically, at page 17 of Petitioner's district court brief Petitioner states: "*It is the appellant's position that a property right is at stake here where 'quasi criminal, quasi prosecutorial' elements as referred to in Mildner are involved.*"

Indeed, the US Supreme Court stated in In Re Ruffalo, 88 SCt 1222, 1226 (1968), that disbarment proceedings were characterized as being "of a quasi-criminal nature." And as the Second Circuit stated in Erdmann v. Stevens, 458 F2d 1205, 1209-1210 (1972): "[I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding..."

Further, and in any event, a form of justiciable property right existed and was defined in the instant case by the Equal Protection Clause--that similarly situated individuals be treated the same. This holds whether it is a policy of giving notice to most attorney defendants, as was done with the second letter of caution and as is their admitted policy [see Finnerty deposition, Appendix O], or as was discussed in Presiding Justice Mangano's letter to Chief Judge Wachtler wherein he stated that Petitioner was afforded "complete due process" by being afforded the post deprivation remedy of a full hearing. (Appendix N)

However, the term "appeal" here is not what is traditionally understood as an appeal. An "appeal" of a letter of caution, where allowed, is just a reconsideration by the same committee and same people who issued the letter in the first place. And whether such a "review" is by a committee or by a court, they both have the power to increase the sanction and do their own fact finding.

In Matter of Holtzman, 78 NY2d 184 (1991), Ms. Holtzman (US Supreme Court, October Term, 1991, Petition Denied) had to risk additional punishment from the same Appellate Division, Second Department by asking for a hearing, and was in fact given additional punishment. In Mildner v. Gulotta, 405 FSupp 182 (EDNY 1974, US Supreme Court, October Term, 1976, Petition

Denied), the Appellate Division, Second Department, in reversing the finding of its referee substituted its own fact finding and disbarred the petitioners.

If the Second Circuit is upheld in the instant case, grievance committees in Brooklyn will now be able to issue letters of caution without notice, while across the East River in the same city letters of caution have been entirely eliminated in Manhattan. Clearly, here, equal protection defines the parameters of an extant property right behind which the Respondents should not be allowed to raise the inconsistent defense that because there was no property right effected, there should be no right to constitutional due process.

First, there was an established state procedure (Parratt, *supra*) of providing notice when a committee raised a charge on its own. Second, there are property rights at stake in quasi criminal proceedings and in proceedings in which similarly situated persons are not treated similarly.

In fact, looking at Mildner, then Holtzman, and now Petitioner's instant case, one must wonder why all this contention is coming from the same Appellate Division, Second Department of the New York State Supreme Court. Perhaps the answer lies in their different rules and different attitude from the rest of New York State. Perhaps those different rules and different attitude in fact do violate United States Constitutional requirements for due process and equal protection.

Mildner specifically made mention of the word "quasi criminal" to describe attorney disciplinary prosecutions. The case was referred to exhaustively throughout these proceedings. If attorney disciplinary proceedings are in fact quasi criminal, then *ipso facto* at a minimum, quasi property rights have to exist from the outset of the targeting of an individual for prosecution, and certainly from sometime before a decision is made to issue a sanction such as a letter of caution. Whether or not the exact words "quasi property" were used in the moving papers before the District Court should be of no consequence. The cases and concepts were submitted and thoroughly discussed.

What Petitioner has even more forcefully been arguing all along, is that in this case there is something more than that, something more substantive than a "quasi" designation would denote, and that "something more" is a full blown property right as defined by the above equal protection analysis.

As to applicable standards of review, there really are none that support Respondents' position. Even under a minimal scrutiny test there is no rational basis or legitimate state interest in having four different sets of disciplinary rules within the same state. The result of the instant action to date has resulted in federal approval of the Second Department in Brooklyn issuing letters of caution without notice while the First Department in Manhattan has eliminated them. It is Petitioner's position that there is no rational basis or legitimate state interest in maintaining such divergent policies within the same state, let alone the same city.

Further, it is Petitioner's position that in as much as the Mildner case has referred to attorney disciplinary matters as "quasi criminal," then a stronger argument can be made for a much stricter equal protection scrutiny.

Finally, the corollary of the Chief Justice's opinion in City of Cleburne v. Cleburne Living Center, 473 US 432 (1985) is even more applicable in the instant case. Where there is no access to a legislative remedy, a heightened level of scrutiny is necessary akin to the "exceedingly persuasive justification" required of the Virginia Military Institute in United States v. Virginia 116 Sct 2264 (1996). In the New York grievance system, there is no legislative review available to attorneys in that the legislature through Judiciary Law Section 90 has vested total control and promulgation of rules of the attorney disciplinary process in the four different Appellate Divisions.

Two other cases are worth looking at in relation to equal protection.

Miller v. Johnson, 115 SCt 2475 (1995) held that redistricting based on race was subject to strict scrutiny and could only be

supported by a compelling government interest. There the Court held the government's interest was not compelling to support *geographic discrimination*. In the instant case the four Appellate Divisions practice their own form of geographic discrimination with their four different sets of rules.

In Romer v. Evans, 116 SCt 1620 (1996), the Court in using the minimal scrutiny standard to review a Colorado provision relating to homosexual practices stated that, "[W]e will uphold the legislative classification so long as it bears a rational relation to some legitimate end." The Court went on to say:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance...A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Similarly, the Petitioner submits that different standards of proof and different sanctions and procedures in the four Appellate Divisions within New York State do not constitute rational and legitimate government classifications.

Here there is no rational relationship to a legitimate governmental purpose, and no legislative recourse. There is geographic discrimination as well as a potential for significant abuse and confusion. These attorney disciplinary investigations are classified as quasi criminal in nature, and the administrative burden of providing minimal procedural due process and fundamental fairness is in fact minimal. All these issues are common to the New York attorney disciplinary system, and all these issues call out for equal protection of the law at increasing levels of scrutiny.

In addition to Petitioner's Equal Protection rights being dismissed by the courts below, similar treatment was garnered as to First and Sixth Amendment arguments.

The First Amendment argument centers on whether the new charge was raised in retaliation as a successive prosecution for Petitioner's questioning the committee's lack of notice on the original charge.

The timing in Petitioner's case was just too much to be a coincidence, and, it was something on which US Magistrate Judge Orenstein specifically commented, *supra.* During a twenty month investigation, there was not a peep out of the committee about either charge. Then they issued a letter of caution with no notice. Then on the heels of Petitioner's letter pointing out the lack of notice, they raised the "registration" charge in spite of the fact that the Office of Court Administration notices to reregister are often sent out notoriously late. Submission of an explanation and a canceled check had no effect in stopping the committee from issuing a second letter of caution. So why, as the Respondent pointed out in his deposition, (Appendix O) would the committee have reversed itself if they reconsidered the matter? Could it not be that whether or not they were technically entitled to issue it, the real reason they issued it was as a *bad faith* Younger v. Harris, 401 US 37 (1971) threat in violation of Petitioner's First Amendment rights?

The other First Amendment issue is how far into an attorney's ability to freely communicate with a client can a grievance committee pry and issue a sanction without effecting the communication? Clearly, the personal pique of a committee should not be allowed to interfere in such a manner with the attorney client relationship.

The Sixth Amendment argument centers on whether in this "quasi criminal" proceeding it was material to know who raised the "threatening a client" charge. Simply put, how else is one to confront an accuser? Any alternative is a star chamber proceeding, to which an accused has no defense no matter what the accused does. If the client was the source, then Petitioner could have defended himself by pointing out the client's impulse control disorder. If the committee was the source, the Petitioner could have pointed out the client's letter of appreciation, could have asked the client if he indeed ever felt "threatened," and could have explained

the substance of the matter if the committee was truly interested in passing judgment on more than just appearances. Neither opportunity was afforded Petitioner either before the letter of caution was issued, or afterward when Respondents allowed an explanation to be submitted. It was not until the matter was in federal court and in discovery that the Respondents admitted they were the source of the complaint. What did they have to hide? And, what type of meaningful appeal could they provide by concealing the fact that they, the Respondents, were in fact the source of the complaint?

The final issue that needs to be addressed is the matter of a reluctant federal constitutional oversight of matters traditionally left to the states. One of the problems with federal review of state court decisions is the inherent dislike of one sovereign overseeing another. It is understandably distasteful. However, in the instant matter, this is not the true case. The oversight is not as to a judicial decision, but rather of an administrative state action function of the courts of the State of New York. The US Supreme Court has ruled in Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 US 719 (1980) that administration of an attorney disciplinary system is not a judicial function, and that the administrators of such a system--invariably the courts--are not immune from actions to redress civil rights violations. Similarly, the US Supreme Court ruled in Pulliam v. Allen, 466 US 522 (1984) that state judicial officials are not immune from legal fees in civil rights actions.

In Forrester v. White, 484 US 219, 108 SCt. 542 (1988) Justice O'Connor expanded this line of reasoning where at page 544 she states:
relief.

> The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform... Administrative decisions, even thought they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts...Likewise, judicial

> immunity has not been extended to judges acting to promulgate a code of conduct for attorneys. Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719...(1980)...Similarly, in the same case, we held that judges acting to enforce the Bar Code would be treated like prosecutors, and thus would be amenable to suit for injunctive and declaratory

She concluded at page 546 stating that:

> Under Virginia law, only that State's judges could promulgate and enforce a Bar Code, but we nonetheless concluded that neither function was judicial in nature.

In other words, federal courts should not hesitate to review constitutionally questionable administrative acts of state courts. Nonetheless, in the instant case, both the District Court and the Second Circuit have actively reviewed only the due process issues, and dismissed First Amendment, Sixth Amendment, and Equal Protection Clause issues.

CONCLUSION

New York State through its four separate Appellate Divisions has four separate and unequal sets of procedural rules for enforcement of attorney discipline. Some are detailed, some are vague. Some use the civil standard of proof, while another, the Third Department, uses the "clear and convincing" standard. In some, letters of caution are disciplinary, in others they are not, and in the First Department they no longer exist.

The Respondents claim that these differences are rationally related to a legitimate state interest.

The Respondents claim the procedures used meet due process standards, and that notice is their policy, yet at the same time they claim no notice was required in the instant case because no property right was effected.

The Respondents claim there was a meaningful right to "appeal" by asking the same Respondents to reconsider their decision. The Respondents claim there was a meaningful right to "appeal" letters of caution to the courts by citing two attorney advertising cases--one in the Third Department that uses a higher standard of proof, and one in the Second Department which dismissed the challenge--the respondents in both those cases claimed the courts had no jurisdiction, while the Respondents in the instant case claim that an improperly issued letter of caution can be challenged in the future if used by a committee against Petitioner. Respondents claim they had a right to issue the second letter of caution and that the timing of its issuance was not a threat to Petitioner's free speech.

The Respondents claim there are no First Amendment rights infringed by sanctioning a confidential communication between an attorney and his client or by raising a new charge within days of Petitioner questioning their lack of notice.

The Respondents claim there was no Sixth Amendment right of Petitioner to confront his accuser, yet they would not admit the identity of the accuser (themselves) until they were sued.

There are serious flaws in the procedures employed by the disciplinary process as currently administered by the Courts of New York. In light of the fact that New York is the only state in the country with such a fractured system, these differences do not appear to rationally support any legitimate state interest under any standard of scrutiny.

It is Petitioner's position that the opening of any attorney disciplinary investigation in New York State effects the property rights of the party being investigated. It is also Petitioner's position that as presently operated there is no meaningful right to appeal to an unbiased tribunal in New York attorney disciplinary proceedings.

Look at the letterhead used in the issuance of the letters of caution in question. The judge (the Chairwoman), the jury (the committee), and the prosecutors are all listed on the same letterhead in the same

office. What kind of due process fundamental fairness does that imply?

The fairness of such proceedings is further compromised by the existence of four different sets of outcome determinative procedure rules *each of which can be enforced statewide.*

And just simply look at the number of pages in Appendices C. D, E, and F. The First Department attorney disciplinary rules are more detailed than all the other departments combined, and specifically the First Department provides four times the procedural detail as the Second Department. On the basis of length alone, equal protection is violated.

Look at the District Judge's opinion. It makes multiple references to attorney disciplinary rules from places other than the Second Department--the department that raised the charges and issued the letters of caution. Rules from the First, Third, and Fourth Departments only have effect in their respective Departments/Divisions, some of which at the time of the District Court's opinion had been repealed for nearly two years. (Letters of caution were eliminated in the First Department May 26, 1994, the District Judge's opinion was issued March 28, 1996 (Appendix H))

If the District Judge can pick and choose rules from the four different Appellate Divisions, why can't Petitioner?

If these multiple, overlapping and distinctly different rules confused the District Judge and his law clerks, what effect do you think they have on persons trying to defend themselves in such a miasma?

The concept of equal protection was set forth to protect against just such fragmentation of rules as currently exists in New York's attorney disciplinary system.

Petitioner's rights to equal protection of the laws, to due process, to a fair hearing, to communicate with his clients, to confront his accusers, and to speak out and petition his accusers that they are

violating his constitutional rights have all been effected by these proceedings and the rules by which they are conducted.

Finally, the relief requested in the instant matter is not only fair, but it is also practical to bring about in that it would only directly effect the issuance of letters of caution in the three departments that have yet to repeal them.

For the above violations of Petitioner's civil and constitutional rights by the Respondents, the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Eastern District of New York should be reviewed by this Court's grant of a writ of certiorari.

Respectfully submitted,

David Golia Paladin, Esq.
Pro Se
P.O. Box 66
Mineola, New York 11501
516 742 4699
February 28, 1997

APPENDIX A
[NEW YORK STATE JUDICIARY LAW SECTION 90]

§ 90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to

their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the second judicial department, may each, with the written consent of the justices of each of such appellate divisions or a majority of such justices, acting for their respective appellate divisions, from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, expressage and postage stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judicial department, be paid by the comptroller of the city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and

method of such reimbursement shall be as specified in section seventy-four of this chapter.'

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any

incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. a. Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

b. Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

c. Whenever an attorney shall be convicted of a crime in a court of record of the United States or of any state, territory or district, including this state, whether by a plea of guilty or nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.

The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause shown.

d. For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

e. For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

f. Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction

until a final order is made pursuant to paragraph g of this subdivision.

Upon good cause shown the appellate division of the supreme court may, upon application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice.

g. Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension. censure or removal from office should not be made.

h. If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice or judge appointed by the appellate division for hearing, report and recommendation.

After said hearing, the appellate division may impose such discipline as it deems proper under the facts and circumstances.

5. a. If such removal or debarment was based upon conviction for a serious crime or upon a felony conviction as defined in subdivision four of this section, and such felony conviction was subsequently reversed or pardoned by the president of the United States, or governor of this or another state of the United States, the appellate division shall have power to vacate or modify such order or debarment, provided, however, that if such attorney or counsellor-at-law h s been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be a basis for application for re-admission in this jurisdiction unless he shall have been readmitted in the jurisdiction where pardoned.

b. If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

c. An attorney and counsellor-at-law who has been convicted of a felony without the state and whose name has been struck from the roll of attorneys prior to July thirteenth, nineteen hundred seventy-nine by virtue of the provisions of subdivision four of this section may, if he alleges that such felony committed without the state would not constitute a felony if committed within the state, petition the appellate division to vacate or modify such debarment. If the appellate division finds that the felony of which the attorney and counsellor-at-law has been convicted without the state would not constitute a felony if committed within the state, it shall grant a hearing and may retroactively vacate or modify such debarment and impose such

discipline as it deems just and proper under the facts and circumstances.

The attorney and counsellor-at-law shall petition for reinstatement by filing in the appellate division a copy of the order of removal together with a request for a hearing pursuant to the provisions of this paragraph. Upon such application, the order of removal shall be deemed an order of suspension for the purposes of a proceeding pursuant to this paragraph.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and Counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary Costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid out of funds appropriated to the office of court administration for that purpose.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services, rendered, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.2

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar association or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are

empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney' the records and documents in relation thereto shall be deemed public records.

APPENDIX B
[UNIFORM RULE ADOPTION]

ADOPTING ORDER

ADMINISTRATIVE ORDER OF THE CHIEF
ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby adopt, effective January 6, 1986, the following Uniform Rules for the Trial Courts of the Unified Court System:

Uniform Rules for the Engagement of Counsel (Part 125)

Uniform Rules for Courts Exercising Criminal Jurisdiction (Part 200)

Uniform Civil Rules for the Supreme Court and County Court (Part 202)

Uniform Rules for the Family Court (Part 205)

Uniform Rules for the Court of Claims (Part 206)

Uniform Rules for the Surrogate's Court (Part 207)

Uniform Rules for the New York City Civil Court (Part 208)

Uniform Rules for the City Courts Outside of the City of New York (Part 210)

Uniform Civil Rules for the District Courts (Part 212)

Uniform Civil Rules for the Justice Courts (Part 214)

APPENDIX C
[CONDUCT OF ATTORNEYS--FIRST DEPARTMENT] PART 603. CONDUCT OF ATTORNEYS, PART 605 RULES AND PROCEDURES OF THE DEPARTMENTAL DISCIPLINARY COMMITTEE, AND AMENDMENT OF MAY 26TH 1994 REPEALING LETTERS OF CAUTION]

§ 603.1 Application

(a) This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in orwho have offices in this judicial department, or who are admitted to practice by a court of another jurisdiction and who practice within this department as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise, and to all legal consultants licensed to practice pursuant to the provisions of subdivision 6 of section 53 of the Judiciary Law. In addition,any attorney from another State, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in this judicial department, or who in anyway participates in any action or proceeding in this judicial department shall be subject to this Part.

(b) Neither the conduct of proceedings nor the imposition of discipline pursuant to this Part shall preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing herein contained shall be construed to deny to any other court or agency such powers as are necessary for that court or agency to maintain control over proceedings conducted before it, such as the power of contempt, or to prohibit bar associations from censuring suspending or expelling their members from membership in the association provided, however that such action by a bar association shall be reported to the Departmental Disciplinary Committee appointed pursuant to section 603.4(a) and provided further that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by the court or such Departmental Disciplinary Committee.

Cross References

Judiciary Law, see McKinncy's Book 29.

§ 603.2 Professional Misconduct Defined

Any attorney who fails to conduct himself both professionally and personally in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or with respect to conduct on or after January l, 1970, any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended, or with respect to conduct on or before December 31, 1969, any canon of the Canons of Professional Ethics, as adopted by such bar association and effective until December 31, 1969, or any of the special rules concerning court decorum. shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law.

Cross References

Judiciary Law, see McKinney's Book 29.

Code of Professional Responsibility, see Appendix to McKinney's Judiciary Law, Book 29.

§ 603.3 Discipline Of Attorneys for Professional Misconduct in Foreign Jurisdiction

(a) Any attorney to whom this Part shall apply, pursuant to section 603.1 of this Part who has been disciplined in a foreign jurisdiction may be disciplined by this court because of the conduct which gave rise to the discipline, imposed in the foreign jurisdiction. For purposes of this Part, foreign jurisdiction means another state, territory or district.

(b) Upon receipt of a certified or exemplified copy of the order imposing such discipline in a foreign jurisdiction, and of the record of the proceedings upon which such order was based, this court, directly or by the Departmental Disciplinary Committee,

shall give written notice to such attorney pursuant to subdivision 6 of section 90 of the Judiciary Law, according him the opportunity, within 20 days of the giving of such notice, to file a verified statement setting forth evidentiary facts for any defense, to discipline enumerated under subdivision (c) of this section, and a written demand for a hearing at which consideration shall be given to any and all such defenses. Such notice shall further advise the attorney that in default of such filing such discipline or such disciplinary action as may be appropriate will be imposed or taken. When a verified statement setting forth evidentiary facts for any defense to discipline and a demand for hearing have been duly filed, no discipline shall be imposed without affording the attorney an opportunity for hearing. The hearing may be conducted by the court or by the Departmental Disciplinary Committee as the court directs. In the event the committee or the attorney desires further action by this court, a petition may be filed in this court together with the record of the proceedings before the committee.

(c) Only the following defenses may be raised:

(1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the attorney's misconduct; or

(3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this jurisdiction.

(d) Any attorney to whom these rules shall apply pursuant to section 603.1 of this Part who has been disciplined in a foreign jurisdiction shall promptly advise this court of such discipline.

(e) Whenever the Departmental Disciplinary Committee learns that an attorney to whom these rules shall apply, pursuant to section 603.1 of this Part, has been disciplined in a foreign jurisdiction, it shall ascertain whether a certified or exemplified copy of the order imposing such discipline has been filed with this court, and if it has not been filed, such committee shall cause such order to be filed.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 603.4 Appointment of Disciplinary Agencies; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure in Certain Cases

(a) (1) This Court shall appoint a Departmental Disciplinary Committee for the Judicial Department, which shall be charge d with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys to whom this Part shall apply, and to impose discipline to the extent permitted by section 603.9 of this Part. This court shall, in consultation with the Departmental Disciplinary Committee, appoint a chief counsel to such committee and such as assistant counsel, special counsel and supporting staff as it deems necessary.

(2) The membership of the Departmental Disciplinary Committee shall be a total of not more than 36 persons each of whom shall be appointed by this court for a term of three years, except members who have been appointed to complete unexpired terms, in which case such members may be reappointed for three-year or shorter terms. Two-thirds of the members of the Departmental Disciplinary Committee shall be members of the Bar of the State of New York in good standing, each of whom shall reside or have an office in the City of New York, and one-third of such members shall be persons who are not members of the Bar, each of whom shall reside or have a principal place of business in the City of New York. Appointments to, the Departmental Disciplinary Committee may

be made from lists of nominees submitted by the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association, and by such other means which the court deems in the public interest. A member of the Bar who has served two consecutive terms shall not be eligible for reappointment until one year after the expiration of the second term. The appropriate committees of The Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association may be designated to investigate and prosecute matters involving alleged misconduct of attorneys. Upon such designation, references in sections 603.3, 603.4(a)(3), (b), (c) and (d), 603.5, 603.6, 603.9, 603.11, 603.12(a) and (e), 603.15, and 603.16 of the rules of this court to the Departmental Disciplinary Committee with respect to the matter or matters to which such designation applies shall mean the Committee of the Association of the Bar of the City of New York, the New York County Lawyers' Association or the Bronx County Bar Association so designated.

(3) The members of the Departmental Disciplinary Committee for the First Judicial Department, as volunteers, are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officer Law.

(b) The rules for the conduct of the proceedings and business of the Departmental Disciplinary Committee have been promulgated by this court and are set forth in Part 605 of this Court's rules. The Departmental Disciplinary Committee may act through its chairperson, acting chairperson, subcommittees or hearing panels.

(c) Investigation of professional misconduct may commenced upon receipt of a specific complaint by this court, or by the Departmental Disciplinary committee or such investigation may be commenced *sua sponte* by this court or by the Departmental disciplinary Committee. Complaints must be in writing and subscribed by the complainant but need not be verified. Whenever the Departmental Disciplinary Committee concludes

that the issue involved upon the complaint is a fee dispute and, accordingly, dismisses the complaint, the chief counsel to the committee or his assistant shall advise the complainant and the respondent that the dispute might be satisfactorily resolved by referring it for conciliation to the Joint Committee on Fee Disputes organized and administered by the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association and with permission of both the complainant and respondent, will forward the file to said committee headquartered at the New York County Lawyers' Association, 14 Vesey Street, New York, N.Y.

(d) When the Departmental Disciplinary Committee, after investigation, determines that it is appropriate to file a petition against an attorney in this court, the committee shali institute disciplinary proceedings in this court and the court may discipline an attorney on the basis of the record of hearings before such committee, or may appoint a referee, justice or judge to hold hearings.

(e)(l) An attorney who is the subject of an investigation, or of charges by the Departmental Disciplinary Committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed *pursuant* to this section, or upon whom a notice has been served pursuant to section 603.3(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation, hearing, or disciplinary proceeding, or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or

(iii) other uncontroverted evidence of professional misconduct.

(2) The suspension shall be made upon the application of the Departmental Disciplinary Committee to this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law. The court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the Committee have been concluded, and until further order of the court.

(f) Disciplinary proceedings shall be granted a preference by this court.

Cross References
Judiciary Law, see McKinney's Book 29.
Public Officers Law, see McKiinney's Book 46.

§ 603.5 Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath

(a) Upon application by the Departmental Disciplinary Committee, or upon application by counsel to such committee, disclosing that such committee is conducting an investigation of professional misconduct on the part of an attorney, or has commenced proceedings against an attorney, or upon application by an attorney under such investigation, or who is a party to such proceedings. the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of any person and the production of books and papers before such committee or such counsel or any subcommittee or hearing panel thereof designated in such application at a time and place therein specified.

(b) The Departmental Disciplinary Committee, or a subcommittee or hearing panel thereof, or its counsel, is empowered to take and cause to be transcribed the evidence of

witnesses who may be sworn by any person authorized by law to administer oaths.

PART 605. RULES AND PROCEDURES OF THE DEPARTMENTAL DISCIPLINARY COMMITTEE

§ 605.1 Title, Citation and Construction of Rules

(a) These Rules shall be known, and may be cited, as the "Rules and Procedures of the Departmental Disciplinary Committee of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department" (hereinafter called the Committee).

(b) These Rules are promulgated for the purpose of assisting the Office of Chief Counsel, the Respondent and the Committee to develop the facts relating to, and to reach a just and proper determination of, matters brought to the attention of the Office of Chief Counsel or the Committee. The Committee will not hold action of a Hearing Panel invalid by reason of any nonprejudicial irregularity. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

§ 605.2 Definitions

(a) Subject to additional definitions contained in subsequent provisions of these Rules which are applicable to specific sections, subsections or other provisions of these Rule, the following words and phrases, when used in these Rules, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section.

(1) Admonition. Discipline administered without hearing, by letter issued by the Committee Chairperson, in those cases in which misconduct in violation of a Disciplinary Rule is found, but is determined to be of insufficient gravity to warrant prosecution of formal charges.

(2) Answer. A formal pleading filed by the Respondent in answer to a Notice of Charges.

(3) Chief Counsel. The Chief Counsel appointed by the Court or, in the absence of such Chief Counsel in the case of vacancy in office, or disability of such Chief Counsel, the Deputy Chief Counsel as designated by the Court.

(4) Code of Professional Responsibility. The Code of Professional Responsibility as adopted by the New York State Bar Association effective January 1, 1970, as the same may from time to time be amended.

(5) *Committee Chairperson.* The Chairperson of the Committee.

(6) *Complainant.* A person communicating a Grievance to the Committee or to the Office of Chief Counsel, whether or not set forth in a complaint.

(7) *Complaint.* A written statement of the nature described in section 605.6 of this Part with respect to a Grievance concerning an attorney communicated to the Committee or to the Office of Chief Counsel.

(8) Court. The Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

(9) Deputy Chief Counsel. The Deputy Chief Counsel appointed by the Court, or in the absence of such Deputy Chief Counsel, the Principal Attorney designated by the Chief Counsel to serve as Deputy Chief Counsel; in the case of vacancy in office, or disability of such Deputy Chief Counsel, the Principal Attorney as designated by the Court.

(10) *Disciplinary Rule.* Any provision of the rules of the Court governing the conduct of attorneys, any Disciplinary Rule of the Code of Professional Responsibility, and any Canon of the Canons of Professional Ethics as adopted by the New York State Bar Association.

(11) *First Department.* The First Judicial Department of the State of New York.

(12) *Formal Proceedings.* Proceedings subject to sections 605.11 through 605.14 of this Part.

(13) *Grievance.* An allegation of misconduct.

(14) *Hearing Panel.* A Hearing Panel established under section 605.18 of this Part.

(15) *Hearing Panel Chairperson.* The member of the Committee designated as chairperson of a Hearing Panel under section 605.18 of this Part.

(16) *Investigation.* Fact gathering under the direction of the Office of Chief Counsel with respect to alleged misconduct.

(17) *Investigator.* Any person designated by the Office of Chief Counsel to assist it in the investigation of alleged misconduct.

(18) Letter of Caution . A letter issued by the Committee Chairperson when it is believed that the

Respondent acted in a manner which, while not constituting a clear violation of a Disciplinary Rule involved behavior requiring comment.

(19) Notice of Charges. A formal pleading served under section 605.12 of this Part by the Office of Chief Counsel requesting action by the Committee.

(20) *Office of Chief Counsel.* The Office of Chief Counsel provided for by section 605.20 of this Part

(21) *Parties.* The Office of Chief Counsel and the Respondent.

(22) *Policy Committee.* The Policy Committee established under section 605.21 of this Part.

(23) *Reprimand.* Discipline administered after a hearing, by the Committee through the Hearing Panel Chairperson, in those cases in which misconduct in violation of a Disciplinary Rule is found.

(24) *Respondent.* An attorney (or attorneys) admitted to practice law in the State of New York (including a legal consultant licensed under Part 610 of the Rules of this Court) or any attorney (or attorneys) specially admitted by a court of the State of New York for a particular proceeding, who in either case is (or are) (1) alleged to have been guilty of misconduct in a Complaint or Notice of Charges and (2) subject to the Disciplinary Rules.

(25) *Reviewing Member.* The member of the Committee designated under section 605.6(f)(2) of this Part to review the disposition of a Complaint recommended by the Office of Chief Counsel.

(26) *Rules.* The provisions of these Rules and Procedures.

(27) *Staff Counsel.* The attorneys (including the Chief Counsel) constituting the Office of Chief Counsel, and where appropriate the attorney or attorneys of the Office of Chief Counsel, or such special counsel as may be appointed by the Committee Chairperson with the approval of the Policy Committee, assigned to a particular investigation or proceeding.

§ 605.3 Location of Office of Chief Counsel

The location of the Office of Chief Counsel and the office of the Chief Counsel is:

Department Disciplinary Committee of the
Appellate Division of the Supreme Court
41 Madison Avenue
New York, NY 10010

§ 605.4 Grounds for Discipline

Section 90 of the Judiciary Law of the State of New York, the Disciplinary Rules and decisional law indicate what shall constitute misconduct and shall be grounds for discipline.

§ 605.5 Types of Discipline; Subsequent Consideration of Disciplinary Action

(a) Misconduct under Section 90 of the Judiciary Law of the State of New York, the Disciplinary Rules or decisional law shall be grounds for any of the following

(1) Disbarment—by the Court.
(2) Suspension—by the Court.
(3) Censure—by the Court.
(4) Reprimand—by the Committee after hearing with or without referral to the Court for further action.
(5) Admonition-by the Committee without hearing.

(b) The Committee Chairperson may issue a Letter of Caution to a Respondent when it is deemed to be appropriate. 'Ihe issuance of a Letter of Caution does not constitute discipline by the Committee.

(c) The fact that an attorney has been issued an Admonition (which has not yet been vacated), or that an attorney has been the subject of a Reprimand (with or without referral to the Court), or that an attorney has been the subject of disciplinary action by the Court, may (together with the basis thereof) be considered in determining whether to impose discipline, and the extent of discipline to be imposed, in the event other charges of misconduct are brought against the attorney subsequently.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 605.6 Investigations and Informal Proceedings

(a) Initiation of Investigations. The Office of Chief Counsel shall, except as otherwise provided by subdivision (g) of this section, undertake and complete an investigation of all matters involving alleged misconduct of attorneys within the jurisdiction of the Committee called to its attention by a Complaint filed pursuant to subdivision (b) of this section, by the Court, or by the Committee by written order, and may, on its own initiative, undertake and complete an investigation of any other matter within the jurisdiction of the Committee otherwise coming to the attention of such Office. The Office of Chief Counsel shall use such Investigators as are deemed appropriate by the Chief Counsel.

(b) Contents of Complaint.

(1) *General Rule.* Each Complaint relating to alleged misconduct of an attorney shall be in writing and subscribed by the Complainant and shall contain a concise statement of the facts upon which the Complaint is based. Verification of the Complaint shall not be required. If necessary the Office of Chief Counsel will assist the Complainant in reducing the Grievance to writing. The Complaint shall be deemed filed when received by the Office of Chief Counsel.

(2) *Other Situations.* In the case of an allegation of misconduct originating in the Court or the Committee, or upon the initiative of the Office of Chief Counsel, the writing reflecting the allegation shall be treated as a Complaint.

(c) Investigation. The staff of the Office of Chief Counsel shall make such investigation of each Complaint as may be appropriate.

(d) Notification to Respondent of Complaint.

(1) *General Rule.* No discipline or Letter of Caution shall be recommended by the Office of Chief Counsel until the

Respondent shall have been afforded the opportunity to state the Respondent's position with respect to the allegations.

(2) *Transmission of Notice.* Except where it appears that there is no basis for proceeding further, the Office of Chief Counsel shall promptly prepare and forward to the Respondent a request for a statement in response to the Complaint, advising the Respondent of:

(i) the nature of the Grievance and the facts alleged in connection therewith; and

(ii) the Respondent's right to state the Respondent's position with respect to the allegations.

Unless a shorter time is fixed by the Committee Chairperson and specified in such notice, the Respondent shall have 20 days from the date of such notice within which to file such a response in the Office of Chief Counsel.

(e) Recommendation of the Office of Chief Counsel. Following completion of any Investigation of the Complaint (including consideration of any statement filed by the Respondent pursuant to section 605.6(d) of this Part), the Office of Chief Counsel shall recommend one of the following dispositions:

(1) referral to another body on account of lack of territorial jurisdiction;

(2) dismissal for any reason (with an indication of the reason therefor), and referral to another body if appropriate;

(3) letter of caution;

(4) admonition; or

(5) formal proceedings before a hearing panel.

(f) Action Following Recommendation.

(1) *No Jurisdiction.* If the Office of Chief Counsel determines that the Complaint should be referred under paragraph (e)(1) of this section, it shall notify the Complainant and the Respondent (if previously notified of the Complaint) of such disposition in

writing and close the file on the matter. Whenever possible in cases of lack of jurisdiction, the Office of Chief Counsel shall bring the matter to the attention of the of the appropriate jurisdiction, or to any other duly constituted body which may be able to provide a forum for the consideration of the Grievances, and shall advise the Complainant of such referral.

(2) *Other Cases.* In the case of recommendations under paragraph (e)(2) of this section, the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, the Chief Counsel) shall designate a member of the Committee to review the recommendation. In the case of recommendations under paragraphs (e)(3) or (4) of this section, the Committee Chairperson (or a member of the Committee designated by the Committee Chairperson) shall review the recommendation. In the case of recommendations under paragraph (e)(5) of this section, the Chief Counsel shall institute Formal Proceedings in accordance with section 605.12 of this Part.

(g) Preliminary Screening of Complaints. Any complaint received by the Office of Chief Counsel against a member of the Committee or Staff counsel involving alleged misconduct shall be transmitted forthwith to the Committee Chairperson, who shall assign it either to the Office of Chief Counsel or to special counsel who shall (1) conduct or direct the appropriate investigation, and (2) give a written recommendation as to the disposition of the Complaint to the Committee Chairperson, who shall determine the appropriate disposition of the Complaint. Any such Complaint which relates to the Committee Chairperson shall, in the first instance, be transmitted to a Hearing Panel Chairperson, who shall conduct the appropriate investigation and determine the appropriate disposition of the Complaint.

§ 605.7 Review of Recommended Disposition of Complaint

(a) Transmission to Reviewing Member. In the case of recommendations under section 605.6(e)(3)or (4) of this Part, the Chief Counsel shall forward the file (including the proposed

disposition letter) to the Reviewing Member designated under section 605.6(f)(2) of this Part for action.

(b) Action by Reviewing Member.

(1) *General Rule.* The Reviewing Member may approve or modify the recommendation of the Office of Chief Counsel concerning the disposition of a Complaint.

(2) *Modification.* If the Reviewing Member determines to modify the recommendation of the Office of Chief Counsel, the Reviewing Member shall set forth such determination in writing together with a brief statement of the reason therefor. Such determination shall be one of the following:

(i) dismissal of the complaint
(ii) further investigation;
(iii) letter of caution;
(iv) admonition; or
(v) formal proceedings before a hearing panel.

(3) *Return of File.* Upon making such determination, the Reviewing Member shall return the file to the Office of Chief Counsel.

(c) **Review of Modification of Recommendation.** If consultation between the Chief Counsel and the Reviewing Member does not resolve any differences of view with respect to any directed disposition, the Office of Chief Counsel shall consult with the Committee Chairperson. The Committee Chairperson shall direct such disposition as may be appropriate.

§ 605.8 Final Disposition Without Formal Proceedings

(a) Notification to Respondent of Disposition of Complaint. Upon the approval of the recommendation of the Office of Chief Counsel by the Reviewing Member, the acceptance of the Reviewing Member's modification by the Office of Chief Counsel,

or the determination of the appropriate disposition by the Committee Chairperson, then, unless the disposition involves the institution of Formal Proceedings, as appropriate:

(1) the Office of Chief Counsel by means of written notice shall notify the Respondent of the dismissal of the Complaint; or

(2) the Committee Chairperson shall transmit to the Respondent a Letter of Caution (which shall bear the designation "LETTER OF CAUTION"); or

(3) the Committee Chairperson shall transmit to the Respondent an Admonition (which shall bear the designation "ADMONITION").

(b) Letters of Caution and Admonitions.

(1) *General Rule.* A written record shall be made of the fact of and basis for Letters of Caution and Admonitions.

(2) *Notice of Right to Submit Response.* In the Letter of Caution, the Respondent shall be advised of:

(i) the Respondent's right under section 605.8(c) of this Part and

(ii) the fact that the issuance of the Letter of Caution does not constitute discipiine by the Committee.

(3) *Notice of Right to Formal Proceedings.* In the Admonition, the Respondent shall be advised of:

(i) the Respondent's right under section 605.8(c) of this Part; and

(ii) the availability of such records for consideration in determining whether to impose discipline, and the extent of discipline to he imposed, in the event other charges of misconduct are brought against the Respondent subsequently.

(c) Action Available to Respondent.

(1) *General Rule.* A Respondent shall not be entitled to appeal either a Letter of Caution or an Admonition, but (i) in the case of a Letter of Caution (other than one issued after a hearing under these Rules), the Respondent may submit a written response, which shall be maintained with the file relating to the complaint; or, in the alternative, Respondent may submit a written application for reconsideration which shall be disposed of in accordance with subsection (3) of this subdivision; (ii) in the case of an Admonition, the Respondent may submit a written application for reconsideration which shall he disposed of in accordance with paragraph (3) of this subdivision; or, in the alternative, Respondent may demand as of right that Formal Proceedings be instituted before a Hearing Panel, in accordance with subsection (2) of this subdivision.

(2) *Formal Proceedings.* A demand under paragraph (1)(ii) of this subdivision that Formal Proceedings be instituted shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the Admonition is sent to the Respondent. In the event of such demand, the Admonition shall be vacated and the Hearing Panel shall not be bound by its terms, but may take any appropriate action authorized by the Rules of the Committee or the Rules of the Appellate Division, First Department, including a Reprimand or referral to the Court.

(3) *Application for Reconsideration.* An application under subsections (1)(i) and (ii) of this subdivision for reconsideration shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the Letter of Caution, or the Admonition, as the case may be, is sent to the Respondent. As soon as practicable after the receipt of an application, the Office of Chief Counsel shall transmit the application and the file relating to the matter to a member of the Departmental Disciplinary Committee (who shall not be a Reviewing Member designated with respect to such matter under section 605.6(f)(2) of this Part) designated to review the matter by the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, by the Chief Counsel). The member so designated

shall either confirm or vacate the Letter of Caution, or the Admonition, as the case may be, or otherwise determine to modify the Letter of Caution, or the Admonition, as the case may be, under section 605.7(b)(2) of this Part.

(d) Notification to Complainant of Disposition of Complaint. The Office of Chief Counsel, by means of written notice shall notify the Complainant of the dismissal of a Complaint, or of the issuance of either a Letter of Caution or an Admonition; notice of any such issuance shall inform the Complainant of the requirement of confidentiality.

§ 605.9 Abatement of Investigation

(a) Refusal of Complainant or Respondent to Proceed, etc. Neither unwillingness or neglect of the Complainant to prosecute a charge, nor settlement, compromise or restitution, nor the failure of the Respondent to cooperate, shall, in itself, justify abatement of an Investigation into the conduct of an attorney or the deferral or termination of proceedings under these Rules.

(b) Matters Involving Related Pending Civil Litigation or Criminal Matters.

(1) *General Rule.* The processing of complaints involving material allegations which are substantially similar to the material allegations of pending criminal or civil litigation need not be deferred pending determination of such litigation.

(2) *Effect of Determination.* The acquittal of a Respondent on criminal charges or a verdict or judgment in the Respondent's favor in a civil litigation involving substantially similar material allegations shall not, in itself, justify termination of a disciplinary investigation predicated upon the same material allegations.

§ 605.10 Resignations, Reinstatements, Convictions of Crimes

(a) Resignations by Attorneys Under Disciplinary Investigations.

(1) *Recommendation to the Court.* Upon receipt by the Committee of an affidavit from an attorney who intends to resign pursuant to the rules of the Court, the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, the Chief Counsel) shall designate a Hearing Panel to review the affidavit and such other matters as it deems appropriate and to determine either (i) to recommend to the Court that the resignation be accepted and to recommend any terms and conditions of acceptance it deems appropriate, or (ii) to recommend to the Court that the resignation not be accepted with the reasons therefor. The Hearing Panel so designated may be a Hearing Panel previously designated to conduct a hearing with respect to the conduct of such attorney. The Committee shall submit the affidavit and the recommendation of the Hearing Panel (which shall constitute the recommendation of the Committee) to the Court, and the proceedings, if any, before the Court shall be conducted by Staff Counsel.

(2) *Notification of Complainant.* In the event the Court accepts the resignation of a Respondent and removes the Respondent on consent, the Office of Chief Counsel by means of written notice shall notify the Complainant of such action.

(b) Applications for Reinstatement. Upon receipt by the Committee of an application of an attorney who has been disbarred or suspended, or whose name has been stricken from the roll of attorneys on consent by order of the Court, applying for reinstatement pursuant to the rules of the Court, the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, the Chief Counsel) shall designate a Hearing Panel to review the application and such other matters as it deems appropriate and to determine either to oppose or not to oppose the application. In the event that Hearing Panel determines that such application for reinstatement should be opposed, Staff Counsel shall present to the Court the determination of the Hearing Panel and the reasons therefor (which shall constitute the recommendation of the Committee).

(c) Determination of Serious Crimes. Upon receipt by the Committee of a certificate demonstrating that an attorney has been convicted of a crime in the State of New York or in any other State, territory or district, the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, the Chief Counsel) shall designate a Hearing Panel to determine whether the crime is a "serious crime" as defined in the rules of the Court governing the conduct of attorneys. Upon a determination by the Hearing Panel that the crime is a serious crime, the Office of the Chief Counsel shall file the certificate of conviction with the Court.

§ 605.11 Formal Proceedings; Preliminary Provisions
(a) Representation of Respondent.

(1) *Appearance Pro Se.* When a Respondent appears pro se in a Formal Proceeding, the Respondent shall file with the Office of Chief Counsel an address to which any notice or other written communication required to be served upon the Respondent may be sent.

(2) Representation of Respondent by Counsel. When a Respondent is represented by counsel in a Formal Proceeding, counsel shall file with the Office of Chief Counsel, a written notice of such appearance, which shall state such counsel's name, address and telephone number, the name and address of the Respondent on whose behalf counsel appears, and the caption of the subject proceeding. Any additional notice or other written communication required to be served on or furnished to a Respondent may be sent to the counsel of record for such Respondent at the stated address of the counsel in lieu of transmission to the Respondent. In any proceeding where counsel has filed a notice of appearance pursuant to this subsection, any notice or other written communication required to be served on or furnished to the Respondent shall also be served upon or furnished to the Respondent's counsel (or one of such counsel if the Respondent is represented by more than one counsel) in the same manner as prescribed for the Respondent, notwithstanding the fact

that such communication may be furnished directly to the Respondent.

(b) Format of Pleadings and Documents. Pleadings or other documents filed in Formal Proceedings shall comply with and conform to the rules from time to time in effect for comparable documents in the Supreme Court in the First Department.

(c) Avoidance of Delay. All Formal Proceedings under these Rules shall be as expeditious as possible. Only the Committee Chairperson, or if a matter has been assigned to a Hearing Panel the appropriate Hearing Panel Chairperson, may grant an extension of time in a Formal Proceeding, and only upon good cause shown. Application for such an extension shall be made, in advance and in writing where practicable, to the Committee Chairperson or to the appropriate Hearing Panel Chairperson.

(d) Service by the Departmental Disciplinary Committee.

(1) Orders, notices and other documents originating with the Committee, including all forms of Hearing Panel or Committee action, petitions and similar process, and other documents designated by the Committee for this purpose, shall be served by the Office of Chief Counsel either personally or by mailing a copy thereof, to the person to be served, addressed to such person at such person's last known address. Whenever any such document is to be served by mail upon the Respondent individually, it shall be by both certified mail, return receipt requested, and by first class mail. In all other instances, service by mail shall be by first class mail.

(2) Service by mail shall be complete upon mailing. When service is not accomplished by mail, personal service may be effected by anyone duly authorized by the Office of Chief Counsel in the manner provided in the laws of the State of New York relating to service of process in civil actions.

(e) Number of Copies. The following number of copies of documents shall be served by each Party in a proceeding:

(1) documents being served by the Office of Chief Counsel: one copy of each document to the Respondent, and one copy of the Notice of Charges to each member of the appropriate Hearing Panel.

(2) documents being served by the Respondent: one copy of each document (plus 10 copies of the Answer) to the Office of Chief Counsel, and one copy of each document to each other Respondent, if any; in each case, to be served personally or by mailing a copy thereof (by certified mail, return receipt requested) to the person to be served.

(3) copies of exhibits to be offered during the hearing shall be provided as specified in section 605.12(d) of this Part.

(f) Amendment and Supplementation of Pleadings. No amendment or supplementation of any Notice of Charges or of any Answer shall be made unless specified in the Pre-Hearing Stipulation or otherwise granted by the appropriate Hearing Panel Chairperson. Any objection to a proposed amendment shall be determined by the Hearing Panel Chairperson upon conditions deemed appropriate.

Whenever, in the course of any hearing under these Rules, evidence shall be presented upon which another charge or charges against the Respondent might be made, it shall not be necessary to prepare or serve an additional Notice of Charges with respect thereto, but the Hearing Panel may, after reasonable notice to the Respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the Notice of Charges, and may render its decision upon all such charges as may be justified by the evidence in the case.

§ 605.12 Formal Proceedings

(a) Commencement of Formal Proceedings. The Office of Chief Counsel shall institute formal disciplinary proceedings by

serving on the Respondent a Notice of Charges under subdivision (b) of this section in either of the following cases:

(1) pursuant to a determination to institute formal proceedings made under section 605.6 or section 605.7 of this Part; or

(2) pursuant to a referral under the rules of the Court.

(b) Notice of Charges.

(1) *Caption.* A Notice of Charges will be captioned as follows:

BEFORE THE DEPARTMENTAL DISCIPLINARY COMMITTEE OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Notice of Charges	:Docket No
	:Before Hearing Panel
	:Consisting of:
In the Matter of	:_____,
	:Chairperson
_____,	:
Respondent.	:_____
	:_____
	:_____
	:_____

(2) *Contents.* The Notice of Charges shall set forth the charges of misconduct against the Respondent and the Disciplinary Rules alleged to have been violated. The Notice of Charges shall indicate the date and time (which shall be determined by the Chief Counsel) and the place of the hearing and shall advise the Respondent that the Respondent is entitled to be represented by counsel, to cross-examine witnesses, to present evidence and shall also indicate the members of the Hearing Panel to which the matter is assigned.

(c) Answer.

(1) *General Rule.* The Respondent shall answer the Notice of Charges by serving and filing an Answer (and 10 copies thereof) in the Office of Chief Counsel within 20 days after service of the Notice of Charges, unless a shorter time is fixed by the Committee Chairperson and specified in the Notice of Charges.

(2) *Contents of Answer.* The Answer shall be in writing and shall respond specifically (by admissions, denials or otherwise) to each allegation of the Notice of Charges and shall assert all affirmative defenses.

(3) *Request to be Heard in Mitigation.* The Respondent may include in the Answer matters in mitigation.

(4) *Effect of Failure to Answer.* In the event the Respondent fails either to serve and file an Answer or respond specifically to any allegation or charge, such allegation or charge shall be deemed admitted.

(d) Pre-hearing Stipulation. A form of a Pre-Hearing Stipulation specifying the following shall be served on the Respondent together with the Notice of Charges:

(1) amendments;

(2) claims or defenses abandoned; or

(3) undisputed facts:

(i) facts not in dispute as to Staff's Counsel's case;
(ii) facts not in dispute as to the Respondent's case;

(4) facts in dispute:

(i) the Staff Counsel's contentions;
(ii) the Respondent's contentions;

(5) documents to be offered in evidence during the hearing:'

(i) the staff will offer the following numbered exhibits
(ii) the Respondent will offer the following lettered exhibits;

(6) witnesses to be called:[2]

(i) by Staff Counsel;
(ii) by the Respondent;

(7) statement of legal contentions and authorities;[3]

(8) length of trial.

(e) No Other Pleadings. Pleadings shall be limited to a Notice of Charges and any Answer thereto, as amended or supplemented in accordance with section 605.11 of this Part.

(f) Assignment for Hearing. Prior to service of the Notice of Charges, the matter shall be assigned to a Hearing Panel. The Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, the Chief Counsel) shall designate the Hearing Panel to which the matter is to be assigned. The Hearing Panel shall not be one which includes any Reviewing Member designated with respect to such matter under section 605.6(f)(2) of this Part, any member of the Committee designated with respect to such matter under section 605.8(c)(3) of this Part, or the Complainant if a member of the Committee. The Office of Chief Counsel shall transmit copies of the Notice of Charges, and of the Answer thereto, if and when available, to the members of such Hearing Panel.

1. All documents (including schedules, summaries, charts and diagrams) to be offered (other than those to be used for impeachment or rebuttal) are to be listed in the stipulation with a discription of each sufficient for identification. The documents are to be premarked by counsel, and, to the extent practicable, such markings are to be in the sequence of which the documents

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2
3

will be offered. If illegible or handwritten documents are to be offered, counsel shall include a typed version of the document.

Objections as to authenticity must be made in this stipulation or else they shall be deemed waived. Counsel are directed to exchange copies of their exhibits within two business days prior to the scheduled hearing.

Counsel offering an exhibit shall provide copies for each member of the panel at that time. Witnesses to be called in rebuttal or for impeachment purposes need not be identified in this stipulation.

2. Witness identification should include the witness' name (and address) and a brief statement of the overall scone of the witness' testimony. For example, if specific witnesses are to be called to substantiate particular claims or defenses on portions thereof, that should be noted. In addition, any witness being called as a character witness should be so designated.

3. Only a brief statement of each contention is required, together with the principal authority relied upon; string cites are not necessary.

§ 605.13 Conduct of Proceedings (a) Expediting Proceedings.

(1) *Conferences.* In order to provide opportunity for the submission and consideration of facts or arguments, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited (including preparation of agreed stipulations of fact) Staff Counsel and Respondent or his attorneys shall meet five (5) days after the Answer is served to complete and sign a Pre-Hearing Stipulation in conformance with the form set forth in section 605.12(d) of this Part. The signed stipulation shall be circulated to all members of the Hearing Panel by Staff Counsel no later than five (5) days prior to the hearing.

(b) Appearances. The Hearing Panel shall cause to be entered upon the record all appearances, with a notation in whose behalf each appearance is made.

(c) Order of Procedure. In proceedings upon a Notice of Charges, the Office of Chief Counsel shall have the burden of proof, shall initiate the presentation of evidence, and may present rebuttal evidence. Opening statements, when permitted in the discretion of the Hearing Panel Chairperson, shall be made first by Staff Counsel. Closing statements shall be made first by the Respondent.

(d) Presentation by the Parties.

(1) *Objections to Hearing Panel Member.* Prior to or at the commencement of the hearing (and any continuation thereof), Staff Counsel and the Respcndent shall state their respective objections, if any, to the participation in the proceeding of any member of the Hearing Panel present. The Hearing Panel shall consider, on an individual basis with respect to each member objected to (with such member not participating in such consideration), such objections and shall, unless such member voluntarily withdraws from the proceedings, make a ruling as to whether such member should (i) participate in the proceedings and deliberations, or (ii) withdraw from the hearing, and such determination by the Hearing Panel shall be final. The places of those objected to who withdraw may, in the discretion of the Hearing Panel, be filled by members of another Hearing Panel, and to the extent possible attorney for attorney and non-attorney for non-attorney; Staff Counsel and the Respondent may state their objections, if any, to any such substitutes.

(2) *General Rule.* Respondent and Staff Counsel shall have the right of presentation of evidence, cross-examination, objection, motion and argument. Members of the Hearing Panel may examine all witnesses.

(e) Limiting Number of Witnesses. The Hearing Panel may limit the number of witnesses who may be heard upon any issue before it to eliminate unduly repetitious or cumulative evidence.

(f) Additional Evidence. At the hearing the Hearing Panel may, if it deems it advisable, authoize any Party to file specific documentary evidence as a part of the record within such time as shall be fixed by the Hearing Panel Chairperson.

(g) Oral Examination. Witnesses shall be examined orally unless the testimony is taken by deposition as provided in Section 605.17(b) of this Part, or the facts are stipulated in the manner provided in section 605.12(d) or 605.13(i) of this Part. Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

(h) Fees of Witnesses. Witnesses subpoenaed by the Office of Chief Counsel or the Respondent shall be paid, by the subpoenaing party, the same fees and mileage as are paid for like service in the Supreme Court in the first Department.

(i) Presentation and Effect of Stipulation. The Parties may stipulate as to any relevant matters of fact or the authenticity of any relevant documents. Such stipulations may be received in evidence at a hearing, and when so received shall be binding on such Parties with respect to the matters therein stipulated.

(j) Admissibility of Evidence.

(1) *General Rule.* All evidence which is deemed by the Hearing Panel Chairperson to be relevant, competent and not privileged shall be admissible in accordance with the principles set out in section 605.1 of this Part.

(2) *Pleadings.* The Notice of Charges and Answer thereto shall, without further action, be considered as parts of the record.

(3) Convictions. A certificate of the conviction of a Respondent for any crime shall be conclusive evidence of the Respondent's guilt of that crime in any disciplinary proceeding instituted against the Respondent and based on the conviction, and the Respondent may not offer evidence inconsistent with the essential elements of the crime for which the Respondent was convicted as determined by the statute defining the crime except such evidence as was not available either at the time of the conviction or in any proceeding challenging the conviction.

(k) Reception and Ruling on Evidence. When objections to the admission or exclusion of evidence are made, the grounds relied upon shall be stated concisely, if so requested by the Hearing Panel Chairperson, and may be stated concisely if no such request is made. Formal exceptions are unnecessary. The Hearing Panel Chairperson shall rule on the admissibility of all evidence.

(l) **Copies of Exhibits.** When exhibits of a documentary character are received in evidence, copies shall, unless impracticable, be furnished to the Parties and to each member of the Hearing Panel present at the hearing.

(m) Recording of Proceeding. Hearings shall be recorded by reporters authorized to take oaths designated by the Office of Chief Counsel, and the transcript of the hearing so recorded, if such transcription is made, shall be a part of the record and sole official transcript of the proceeding. Such transcript shall consist of a verbatim report of the hearing, an exhibit list and the reporter's certificate, and nothing shall be omitted from the record except as is directed by the Hearing Panel Chairperson. After the closing of the record, there shall not be received in evidence or considered as part of the record any document submitted after the close of testimony, except as provided in subdivision (a) of this section or changes in the transcript, except as provided in subdivision (no) of this section.

(n) Transcript Corrections. Corrections in the official transcript may be made only to make it conform to what actually transpired at the hearing. No corrections or physical changes

shall be made in or upon the official transcript of the hearing except as provided in this section. Transcript corrections agreed to by all Parties may be incorporated into the record, if and when approved by the Hearing Panel Chairperson, at any time during the hearing or after the close of the hearing, but in no event more than 10 days after the receipt of the transcript. Resolution of any dispute among the Parties as to correction of the official transcript shall be resolved by the Hearing Panel Chairperson, whose decision shall be final.

(o) Copies of Transcripts. A Respondent desiring copies of an official transcript may obtain such copies at the Respondent's own expense from the official reporter. Any witness may obtain from the official reporter at the witness' own expense a copy of that portion of the transcript relating to the witness' own testimony, or any part thereof. The Office of Chief Counsel shall in either such case, bear the expense of one such copy if and when directed by the Hearing Panel Chairperson upon good cause shown.

§ 605.14 Concluding Procedures

(a) Determinations.

(1) *The Charges.* After the hearing of oral arguments, if any, all persons other than members of the Hearing Panel shall withdraw, and the Hearing Panel shall in executive session make its determination as to whether any charges against the Respondent are to be sustained.

(2) *No Charge Sustained* If none of the charges against the Respondent are sustained, the Hearing Panel Chairperson shall so advise the Parties on the record, and the charges shall be dismissed and the matter closed. With respect to any charge that has been dismissed, the Hearing Panel may, if it deems it appropriate in the circumstances, recommend that the Committee Chairperson transmit a Letter of Caution to the Respondent, subject to and in accordance with section 605.5(c) and section 605.8(a) through (d) of this Part, which Letter of Caution shall be final.

(3) *Any Charge Sustained.* If any charge against the Respondent is sustained, the Hearing Panel Chairperson shall so advise the Parties on the record, and shall thereupon ascertain from Staff Counsel, as permitted by section 605.5(b) of this Part, whether the Respondent has previously been subject to disciplinary action by the Court, the Departmental Disciplinary Committee, any grievance committee established or authorized by any other Appellate Division of the Supreme Court of the State of New York, or by any other court.

(4) *Sanctions.* Following the determination to be made in accordance with paragraph (3) of this subdivision, all persons other than members of the Hearing Panel shall withdraw, and the Hearing Panel shall in executive session determine the disciplinary sanction to be imposed, which shall be one of the following:

(i) reprimand;

(ii) referral to the Court, with a recommendation as to censure, suspension or disbarment if deemed appropriate by the Hearing Panel; or

(iii) reprimand, with referral to the Court, with a recommendation as to censure, suspension or disbarment if deemed appropriate by the Hearing Panel.

Upon such determination having been made, the Hearing Panel Chairperson shall so advise the Parties on the record, and if a Reprimand is to be delivered, the Hearing Panel Chairperson shall thereupon deliver the Reprimand and advise the Respondent of the Respondent's rights under section 605.15(c) of this Part.

(b) Findings of Fact and Conclusions of Law.

(1) *Staff Counsel's Proposals.* In the event the Hearing Panel determines, pursuant to section 605.14(a)(4)(ii) or (iii) of this Part, to refer the matter to the Court, Staff Counsel shall, within 10 days of the receipt of the official transcript of the hearing

deliver to the Respondent proposed Findings of Fact and Conclusions of Law.

(2) *Respondent's Counter Proposals.* The Respondent may submit counter proposed findings of fact and conclusions of law which shall be delivered to the Hearing Panel Chairperson with a copy to Staff Counsel, within ten days following the delivery of the proposed findings and conclusions prepared by Staff Counsel. Failure of Respondent to submit such proposals within such ten-day period shall constitute approval of the findings and conclusions prepared by Staff Counsel.

(3) *Review by Hearing Panel Member.* The Hearing Panel Chairperson shall assign the review of the proposed findings of fact and conclusions of law to a member of the Hearing Panel, who shall review the proposed findings and conclusions and resolve conflicts, if any, and, no later than ten days following receipt thereof, transmit to the Hearing Panel Chairperson the proposed findings and conclusions as approved by such member.

(c) Hearing Panel Opinions.

(1) *Preparation of Opinion.* In the event the Hearing Panel determines, pursuant to subparagraph (a)(4)(ii) or (iii) of this section, to refer a matter to the Court, the Hearing Panel at the conclusion of its hearing shall also determine whether an opinion of the Hearing Panel is appropriate. If so, the Hearing Panel member who is designated under paragraph (b)(3) of this section to review the findings of fact and conclusions of law shall prepare such opinion, and such opinion (which shall include the recommendation, if any, of the Hearing Panel to the Court as to the discipline to be imposed upon the Respondent) shall be transmitted to the Hearing Panel Chairperson together with the proposed findings and conclusions approved by such member.

(2) *Hearing Panel Review.* Within 48 hours of receipt of the findings and conclusions, and opinion, if any, from a Hearing Panel member, the Hearing Panel Chairperson shall cause such materials to be distributed to the other members of the Hearing Panel who participated in the hearing and determination.

Suggested revisions shall be made to the Hearing Panel Chairperson within 48 hours. The absence of comment within 48 hours shall be deemed approval of the form and substance of the findings, conclusions and opinion. The Hearing Panel Chairperson shall resolve all conflicts among members of the Hearing Panel relating to the findings, conclusions and opinion.

(d) Briefs. If and to the extent requested by the Hearing Panel Chairperson, briefs shall be served by each Party upon the other Parties within such time as the Hearing Panel Chairperson shall designate.

(e) Hearing Panel Report. The report of the Hearing Panel shall include the Hearing Panel's findings of fact and conclusions of law and opinions, if any.

(f) Service of Report. The Hearing Panel report shall promptly be filed by the Hearing Panel Chairperson with the Office of Chief Counsel, which shall serve copies thereof upon the Respondent.

§ 605.15 Action by the Departmental Disciplinary Committee

(a) Dismissal of All Charges. In the event that the Hearing Panel determines that all charges considered at a hearing should be dismissed, the Office of Chief Counsel shall give written notice of such determination to the Respondent and the Complainant, which notice shall, in the case of the Complainant, include notification of any Letter of Caution issued in accordance with section 605.14(a)(2) of this Part.

(b) Reprimand.

(1) *Notice.* In the event that the Hearing Panel determines that the proceeding should be concluded by Reprimand (with or without referral of the matter to the Court), the Committee Chairperson shall give written confirmation thereof (which shall bear the designation "REPRIMAND") to the Respondent and Staff Counsel, which notice shall also advise the Respondent of:

(i) the charges which were sustained;
(ii) any charges which were dismissed;
(iii) the Respondent's right under subdivision
(c)of this section to petition the Court; and
(iv) the determination, if made, to refer the matter to the Court.

(2) *Record.* The confirmation shall constitute a written record of the Reprimand, and shall be permanently retained.

(c) Petition by Respondent to Vacate Reprimand. A Respondent shall not be entitled to appeal a Reprimand by a Hearing Panel, but in the case of a Reprimand without referral of the matter to the Court the Respondent may petition the Court to vacate the Reprimand pursuant to the rules of the Court. In the event of such petition, if so determined by the Hearing Panel Chairperson, the disciplinary sanction shall become a Reprimand with referral to the Court under section 605.14(a)(4)(iii) of this Part, and shall be treated as such under section 605.14(b) to (f) of this Part.

(d) Notification of Complainant. The Office of Chief Counsel by means of written notice shall notify the Complainant of any Reprimand which has become final and is not subject to further review, and the notice shall inform the Complainant of the requirement of confidentiality.

(e) Referral to the Court.

(1) General Rule. In the event that the Hearing Panel shall determine that the matter should be concluded by referral to the Court (with or without Reprimand), or by Reprimand without referral to the Court in cases where the Respondent is unwilling to have the matter concluded by such Reprimand, the Committee shall submit the report of the Hearing Panel (which shall constitute the report of the Committee), together with the entire record as reflected in the docket maintained by the Office of Chief Counsel, to the Court and the proceedings, if any, before the Court shall be conducted by Staff Counsel.

(2) *Procedure.* The Committee (or, upon the general or limited written direction of the Committee Chairperson, the Chief Counsel) shall transmit the report and the record to the Court with an appropriate petition. Copies of such petition shall be served by the Office of Chief Counsel upon the Respondent.

(3) Notification of Complainant. The Office of Chief Counsel by means of written notice shall notify the Complainant of any referral to the Court (which notice shall inform the Complainant of the requirement of confidentiality), and of any final action by the Court.

§ 605.16 Reopening of Record

(a) Reopening on Application of Respondent.

(1) *Application to Reopen.* No application to reopen a proceeding shall be granted except upon the application, prior to the filing by the Hearing Panel of its report, of the Respondent and only upon good cause shown. Such application shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, and shall be filed with the Office of Chief Counsel. A copy of such application shall be served by the Respondent upon all other Parties.

(2) *Responses.* Within five days following the receipt of such application, any other Party may file with the Office of Chief Counsel an answer thereto, and in default thereof shall be deemed to have waived any objection to the granting of such application.

(3) *Action on Application.* As soon as practicable after the filing of an answer to such application or default thereof, as the case may be, the Office of Chief Counsel shall transmit such documents to the Hearing Panel Chairperson who shall grant or deny such petition.

§ 605.17 Subpoenas, Depositions and Motions

(a) Subpoenas. Both Staff Counsel and the Respondent shall have the right to summon witnesses and require production of

books and papers by issuance of subpoenas in accordance with the rules of the Court.

(b) Depositions. When there is good cause to believe that the testimony of a potential witness will be unavailable at the time of hearing, testimony may be taken by deposition. Such deposition shall be initiated and conducted in the manner provided for the taking of depositions in the New York Civil Practice Law and Rules, and the use of such depositions at hearings shall be in accordance with the use of depositions at trials under the Civil Practice Law and Rules.

(c) Motions. The Hearing Panel to which a matter has been assigned will entertain, from time to time, such motions as justice may require, in accordance with the principles set out in section 606.1(b) of this Part.

§ 605.18 Membership, Committees, Officers and Office of Chief Counsel

(a) Membership.

(1) *General.* The Committee consists of volunteers appointed by the Court.

(2) *Disqualification.* No person shall, while serving on the Committee, appear before the Committee or any Hearing Panel on behalf of any other person.

(b) Policy Committee and Hearing Panels; Subcommittees. The Committee Chairperson shall from time to time appoint, subject to the approval of a majority of the total membership of the Departmental Disciplinary Committee, from among the members of the Committee (1) a Policy Committee consisting of the Committee Chairperson and six or more other members, and (2) three or more Hearing Panels each consisting of five or more members. No person shall serve concurrently either on the Policy Committee and Hearing Panel, or on more than one Hearing Panel (except by virtue of substitution in accordance with section

605.13(d)(1) of this Part, or when requested by a Hearing Panel Chairperson to serve on another Hearing Panel in order to assure the presence of a quorum, and in any such event such person shall also be deemed a member of such other Hearing Panel with respect to and for the remainder of the proceeding). To the extent the Committee consists of attorneys and non-attorneys, the Committee Chairperson shall endeavor to appoint attorney and non-attorney members to the Policy Committee and to each Hearing Panel in, as nearly as possible, the same proportion as there are attorney and non-attorney members of the entire Committee. The Committee Chairperson may from time to time establish one or more subcommittees of the Committee, consisting of one or more members of the Committee for such purposes as the Committee Chairperson shall direct.

(c) Officers. The Committee Chairperson shall serve as the chairperson of the Policy Committee. The Committee Chairperson shall appoint a Hearing Panel Chairperson for each of the Hearing Panels from among the members thereof who are attorneys. The Committee Chairperson shall also appoint a Secretary of the Committee. Each Hearing Panel Chairperson and the Secretary shall be appointed for a one year term, and may be appointed for additional terms while serving on the Committee. The Committee Chairperson may from time to time appoint, from among the members of the Policy Committee, an Acting Committee Chairperson who shall, in the absence of the Committee Chairperson, have all the powers of the Committee Chairperson.

(d) Duties of Officers. The Committee Chairperson, each Hearing Panel Chairperson and the Secretary shall have such duties as are provided in this Part.

§ 605.19 Meetings of the Departmental Disciplinary Committee

(a) Meetings, Notice of Time and Place. The Committee shall meet not less frequently than every other month, and such meetings shall be held upon notice from the Secretary given at the

direction of the Committee Chairperson or five members of the Committee. The notice shall he in writing and shall set forth the date and time of the meeting, which shall take place at such place as may be designated by resolution of the Departmental Disciplinary Committee or, in the absence of such resolution, by the Committee Chairperson. In lieu of such written notice, meetings may be called on notice given to each member of the Committee not less than 24 hours prior to the time fixed for the meeting, in person or by telephone or telegraph. All notices shall be given to members of the Committee at the addresses furnished for such purposes by the members to the Secretary.

(b) Organization. The Committee Chairperson shall preside at all meetings of the Committee. In the absence of the Committee Chairperson and the Acting Committee Chairperson, any member of the Committee selected for the purpose by the members present at the meeting may preside at the meeting. The Secretary shall keep the minutes of all meetings of the Committee, and in the absence of the Secretary the person presiding at the meeting shall appoint a member present to keep the minutes.

(c) Agenda. To the extent possible, an agenda for each meeting of the Committee shall be prepared by or with the approval of the Committee Chairperson, or the members calling the meeting, and distributed by the Secretary to all members of the Committee together with the notice of meeting or subsequent thereto but prior to the meeting.

(d) Quorum and Manner of Acting. A majority of the members of the (Committee shall constitute a quorum for the transaction of business, and all action shall require an affirmative vote of a majority of the members present at the meeting.

§ 605.20 Office of Chief Counsel

(a) General. There shall be an Office of Chief Counsel which shall consist of the Chief Counsel, Deputy Chief Counsel and other Staff Counsel.

(b) Supervision by Chief Counsel. The Office of Chief Counsel shall be supervised by the Chief Counsel who shall, either personally or by other Staff Counsel, exercise the powers and perform the duties of the Office of Chief Counsel set forth in these Rules. The Chief Counsel may from time to time designate the Deputy Chief Counsel or in the absence of such Deputy Chief Counsel, an Associate Counsel, to serve as Acting Chief Counsel in the Chief Counsel's absence.

(c) Powers and Duties of the Office of Chief Counsel. The Office of Chief Counsel shall:

(1) have the powers and duties set forth in this Part;

(2) maintain permanent records of all matters processed by it, including the disposition thereof, and maintain dockets and assign such docket numbers as may be appropriate for the clear designation of each matter, which shall include the calendar year in which the matter is originally docketed;

(3) represent the Committee in all proceedings before the Court; and

(4) have such other duties as may be assigned to it from time to time by the Committee Chairperson the Policy Committee or the Committee.

§ 605.21 Policy Committee

(a) General. The Policy Committee shall:

(1) have the powers and duties set forth in this Part;

(2) consult with and report regularly to the full Committee;

(3) consider and recommend to the Committee the establishment of policy for the Committee including, without limitation, the establishment of priorities for type of misconduct to be

investigated and prosecuted, standards to insure uniform treatment of cases and, subject to these Rules, the establishment of procedures for the conduct of investigations by the Office of Chief Counsel and hearings by the Hearing Panel;

(4) oversee and evaluate on a continuing basis the effectiveness of the operation of the Committee to assure the integrity of the attorney disciplinary system;

(5) develop and implement a program to make the public aware of the importance and effectiveness of the disciplinary procedures and activities of the Committee; and

(6) engage in such activities as may be assigned to it by the Committee or the Committee Chairperson.

(b) Meetings, Notice of Time and Place, Agenda. The Policy Committee shall meet not less frequently than monthly, and such meetings shall be held upon notice from the Committee Chairperson or three members of the Policy Committee. The notice shall be in writing and shall set forth the date and time of the meeting, which shall take place at such place as may be designated by resolution of the Policy Committee or, in the absence of such resolution, by the Committee Chairperson.. In lieu of such written notice, meetings may be called on notice given to each member of the Policy Committee not less than 24 hours prior to the time fixed for the meeting, in person or by telephone or telegraph. All notices shall be given to members of the Policy Committee at the addresses furnished for such purpose by the members to the Secretary. To the extent possible, an agenda for each meeting of the Policy Committee shall be prepared with the approval of the Committee Chairperson, or the members calling the meeting, and distributed by the Secretary to all members of the Policy Committee together with the notice of meeting or subsequent thereto but prior to the meeting.

(c) Organization. The Committee Chairperson shall preside at all meetings of the Policy Committee and shall appoint a secretary who shall keep the minutes of the meetings. In the absence of the

Committee Chairperson and the Acting Committee Chairperson, any member of the Policy Committee selected for the purpose by the members of the Policy Committee present at the meeting may preside at the meeting. The Committee Chairperson may from time to time establish subcommittees of the Policy Committee, consisting of one or more members of the Policy Committee, for such purposes as the Committee Chairperson shall direct.

(d) Quorum and Manner of Acting. A majority of the members of the Policy Committee shall constitute a quorum for the transaction of business, and all action shall require an affirmative vote of a majority of the total membership of the Policy Committee.

§ 605.22 Hearing Panels

(a) General. Each Hearing Panel shall:

(1) have the powers and duties set forth in these Rules, including, without limitation, the power and duty to conduct hearings into formal charges of misconduct, and to make such determinations and to impose such disciplinary sanctions as it may deem appropriate, in accordance with this Part; and

(2) perform such other duties as may be imposed by or pursuant to this Part.

(b) **Officers.** Each Hearing Panel shall be presided over by a Hearing Panel Chairperson designated under section 605.18(1) of this Part or by an Acting Healing Panel Chairperson, who shall be appointed by the Committee Chairperson from among the members of the Hearing Panel who are attorneys to serve in the absence of the Hearing Panel Chairperson. Each Hearing Panel Chairperson shall have such powers and duties as are set forth in this Part.

(c) Quorum and Manner of Acting. A majority of the members of a Hearing Panel shall constitute a quorum for the transaction of business, and all action shall require an affirmative vote of a majority of the members present, except the determination by the

Hearing Panel § 605.14(a) of this Part (other than as to the dismissal of all the charges against the Respondent) shall require an affirmative vote of not less than three members of the Hearing Panel of whom at least two shall have heard the entire proceeding before the Hearing Panel and the other of whom either shall have heard the entire proceeding before the Hearing Panel or shall have read the transcript of, that portion (which may be all) of the proceeding not heard.

§ 605.23 Committee Chairperson and Secretary

In addition to such other duties as are set forth in this Part, the Committee Chairperson shall perform such duties as may be assigned by the Committee, and the Secretary shall perform such duties as. may be assigned by the Committee or the Committee Chairperson.

§ 605.24 Confidentiality

(a) Confidentiality of All Complaints and Procedures. All matters relating to complaints submitted to the Committee, and any action taken by the Office of Chief Counsel, the Committee, the Policy Committee, or any Hearing Panel with respect thereto, shall be kept confidential in accordance with applicable law.

(b) Waiver. Upon the written waiver of confidentiality by any Respondent, All participants shall thereafter hold the matter confidential to the extent required by the terms of the waiver.

[AMENDMENT OF MAY 26TH 1994 REPEALING LETTERS OF CAUTION]

APPELLATE DIVISION
First Department

The Justices of the Appellate Division of the Supreme Court, First Judicial Department, by virtue of the authority vested in them, do hereby amend §603.9, §605.2, §605.5, §605.6, 0605.7,

§605.8, 8605.14 and §605.15 of the Rules of the Court (22 NYCRR, Part 600), to read as follows, effective immediately:

§603.9 Discipline by the Departmental Disciplinary Committee

[(b) The Departmental Disciplinary Committee may issue a letter of caution to an attorney when it is believed that the attorney acted in a matter which, while not constituting clear professional misconduct, involved behavior requiring comment. A letter of caution is not discipline but may be considered in determining whether to impose discipline or the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney subsequently.]

§605.2 Definitions

(a) Subject to additional detections contained in subsequent provisions of these Rules which are applicable to specific sections, subsections or other provisions of these Rules, the following words and phrases when used in these Rules, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

[(18) Letter of Caution. A letter issued by the Committee Chairperson when it is believed that the Respondent acted in a manner which while not constituting a clear violation of a Disciplinary Rule, involved behavior requiring comment.]

[(19)](18) Notice of Charges. A formal pleading served under §605.12 of this Part by the Office of Chief Counsel requesting action by the Committee.

[(20)](19) Office of Chief Counsel. The Office of Chief Counsel provided for by §605.20 of this Part.

[(21)](20) Parties. The Office of Chief Counsel and the Respondent.

[(22)](21) Policy Committee. The Policy Committee established under §605.21 of this Part.

[(23)](22) Reprimand. Discipline administered after a hearing, by the Committee through the Hearing Panel Chairperson, in those cases in which misconduct in: violation of a Disciplinary Rule is found.

[(24)](23) Respondent. An attorney (or attorneys) admitted to practice law in the State of New York (including a legal consultant licensed under Part 610 of the Rules of this Court) or any attorney (or attorneys) specially admitted by a court of the State of New York for a particular proceeding who in either case is (or are) (1) alleged to have been guilty of misconduct in a Complaint or Notice of Charges and (2) subject to the Disciplinary Rules.

[(25)](24) Reviewing Member. The member of the Committee designated under §605.6(f)(2) of this Part to review the disposition of a Complaint recommended by the Office of Chief Counsel.

[(26)](25) Rules. The provisions of these Rules and Procedures.

[(27)](26) Staff Counsel. The attorneys (including the Chief Counsel) constituting the Office of Chief Counsel, and where appropriate the attorney or attorneys of the Office of Chief Counsel, or such special counsel as may be appointed by the Committee Chairperson with the approval of the Policy Committee, assigned to a particular investigation or proceeding.

§605.5 Types of Discipline; Subsequent Consideration of Disciplinary Action

[(b) The Committee Chairperson may issue a Letter of Caution to a Respondent when it is deemed to be appropriate. The issuance of a Letter of Caution does not constitute discipline by the Committee.]

[(c)](b) The fact that an attorney has been issued an Admonition (which has not yet been vacated), or that an attorney has been the subject of a Reprimand (with or without referral to the Court), or that an attorney has been the subject of disciplinary action by the Court, may (together with the basis thereof) be considered in determining whether to impose discipline, and the extent of discipline to be imposed, in the event other charges of misconduct are brought against the attorney subsequently.

§605.6 Investigations and Informal Proceedings

(a) Notification to Respondent of Complaint.

(1) General Rule. No discipline [or Letter of Caution] shall be recommended by the Office of the Chief Counsel until the Respondent shall have been afforded the opportunity to state the Respondent's position with respect to the allegations.

(e) Recommendation of the Office of Chief Counsel. Following completion of any Investigation of the Complaint (including consideration of any statement filed by the Respondent pursuant to §605.6(d) of this Part), the Office of Chief Counsel shall recommend one of the following dispositions: [(3) letter of caution;]

[(4)](3) admonition; or

[(5)](4) formal proceedings before a hearing panel.

(f) Action Following Recommendation.

(2) Other Cases. In the case of recommendations under paragraph (e)(2) of this section, the Committee chairperson shall designate a member of the Committee to review the recommendations. in the cases of recommendations under paragraphs (e)(3) [or (4)] of this section, the Committee

chairperson (or a member of the Committee designated by the Committee chairperson) shall review the recommendations. In the case of recommendations under paragraph (e)[5](4) of this section, or under §605.15 (e)(2) of this part, the Committee chairperson shall designate a member of the policy committee who is a lawyer to review the recommendations.

§605.7 Review of Recommended Disposition of Complaint.

(a) Transmission to Reviewing Member. In the case of recommendations under §605.6(e)(3) [or (4)] of this part, the chief counsel shall forward the file (including the proposed disposition letter) to the reviewing member designated under §605.6(f)(2) of this part for action. In the case of recommendations under 605.6(e)[(5)](4) of this part, the chief counsel shall forward the file, the proposed charges, and a memo summarizing the evidence adduced in support of the charges to the reviewing policy member designated under 605.6(f)(2) of this part for action. In the case of recommendations to file a motion to disaffirm under §605.15(e)(2) of this part, the chief counsel shall forward the hearing panel's report, the proposed motion, and memo of law or other memo summarizing the reasons for the motion, to the reviewing member designated under 0605.6(f)(2) of this part for action.

(b) Action by Reviewing Member.

(2) Modification. If the Reviewing Member determines to modify the recommendation of the Office of Chief Counsel, the Reviewing Member shall set forth such determination in writing together with a brief statement of the reason there for. Such determination shall be one of the following:
(i) dismissal of the complaint;
(ii) further investigation;
[(iii) letter of caution;]
[(iv)]*(iii)* admonition; or

[(v))]*(iv)* formal proceedings before a hearing panel.

§605.8 Final Disposition Without Formal Proceedings

(a) Notification to Respondent of Disposition of Complaint. Upon the approval of the recommendation of the Office of Chief Counsel by the Reviewing Member, the acceptance of the Reviewing Member's modification by the Office of Chief Counsel, or the determination of the appropriate disposition by the Committee Chairperson, then, unless the disposition involves the institution of Formal Proceedings, as appropriate:

(1) the Office of Chief Counsel by means of written notice shall notify the Respondent of the dismissal of the Complaint: or

[(2) the Committee Chairperson shall transmit to the Respondent a Letter of Caution (which shall bear the designation "LETTER OF CAUTION"); or]

[(3)](2) the Committee Chairperson shall transmit to the Respondent an Admonition (which shall bear the designation "ADMONITION").

(b) [Letters of Caution and] Admonitions.

(1) General Rule. A written record shall be made of the fact of and basis for [Letters of Caution and] Admonitions.

[(2) Notice of Right to Submit Response. In the letter of caution, the respondent shall be advised of:

(i) the respondent's right under §605.8(c) of this part; and

(ii) the fact that the issuance of the letter of caution does not constitute discipline by the Committee; and

(iii) the fact that the letter of caution may be brought to the attention of a hearing panel In any proceeding under §605.14(a)(3) of this part.]

[(3)](2) Notice of Right to Formal Proceedings. In the Admonition, the Respondent shall be advised of:

(i) the Respondent's right under §605.8(c) of this Part; and

(ii) the availability of such records for consideration in determining whether to impose discipline, and the extent of discipline to be imposed, in the event other charges of misconduct are brought against the Respondent subsequently.

(c) Action Available to Respondent.

(1) General Rule. A Respondent shall not be entitled to appeal [either a Letter of Caution or] an Admonition, but [(i) in the case of a Letter of Caution (other than one issued after a hearing under these Rules), the Respondent may submit a written response, which shall be maintained with the file relating to the complaint; or, in the alternative, Respondent may submit a written application for reconsideration which shall be disposed of in accordance with subsection (3) of this subdivision; (ii) in the case of an Admonition,] the Respondent may submit a written application for reconsideration which shall be disposed of in accordance with paragraph (3) of this subdivision; or, in the alternative, Respondent may demand as of right that Formal Proceedings be instituted before a Hearing Panel, in accordance with subsection (2) of this subdivision.

(2) Formal Proceedings. A demand under paragraph (1) [(ii)] of this subdivision that Formal Proceedings be instituted shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the Admonition is sent to the Respondent. In the event of such demand, the Admonition shall be vacated and the Hearing Panel shall not be bound by its terms, but may take any appropriate action authorized by the Rules of the Committee or the Rules of the Appellate Division, First Department, including a Reprimand or referral to the Court.

(3) Application for Reconsideration. An application under [subsections] *paragraph (1)[(i)* and (ii)] of this subdivision for reconsideration shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which (the Letter of Caution, or] the Admonition[, as the case may be,] is sent to the Respondent. As soon as practicable after the receipt of an application, the Office of Chief Counsel shall transmit the application and the file relating to the matter to a member of the Departmental Disciplinary Committee (who shall not be a Reviewing Member designated with respect to such matter under §605.6(f)(2) of the Part) designated to review the matter by the Committee Chairperson (or, upon general or limited written direction of the Committee Chairperson, by the Chief Counsel). The member so designated shall either confirm or vacate [the

Letter of Caution, or] the Admonition[, as the case may be,] or otherwise determine to modify [the Letter of Caution, or] the Admonition [, as the case may be,] under §605.7(b)(2) of this Part.

(d) Notification lo Complainant of Disposition of Complaint. The Office of Chief Counsel, by means of written notice, shall notify the Complainant of the dismissal of a Complaint, or of the issuance of [either a Letter of Caution or] an Admonition.

§605.14 Concluding Procedures

(a) Determinatons.

(3) Any Charge Sustained. If any charge against the Respondent is sustained, the hearing panel chairperson shall so advise he parties on the record, and shall thereupon ascertain from staff counsel, whether the Respondent [has previously received a letter of caution or] has previously been subject to disciplinary action by tile Court, the Departmental Disciplinary Committee, any grievance committee established or authorized by any other Appellate Division of the Supreme Court of he State of New York, or by any other court.

§605.15 Action by the Departmental Disciplinary Committee.

(a) Dismissal of All Charges. In the event that a hearing panel determines that all charges considered at a hearing should be dismissed, the Office of Chief Counsel shall give written notice of such determination to the respondent and the complainant. [which notice shall, in the case of the complainant, include notification of any letter of caution issued in accordance with §605.14(a)(2) of this Part.] This decision shall be final and the matter closed, unless within sixty day of either the date on which the hearing panel states its reasons or the date on which the hearing panel issues a report (whichever is later) the Chief Counsel files a motion to disaffirm under §605.15(e)(2) of this Part.

Francis T. Murphy, Presiding Justice

Matter to be deleted is in brackets [ ]
Matter to be added is in italics.

APPENDIX D
[CONDUCT OF ATTORNEYS--SECOND DEPARTMENT]

PART 691. CONDUCT OF ATTORNEYS

§ 691.1 Application

(a) This Part shall apply to all attorneys who are admitted to practice, reside in commit acts in or who have offices in the Second Judicial Department, or who are admitted to practice by a court of another jurisdiction and who regularly practice within this department as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise. In addition, any attorney from another state, territory, district or foreign country admitted *pro hac vice to* participate in the trial or argument of a particular cause in any court in the Second Judicial Department, or who in any way participates in an action or proceeding therein, shall be subject to this Part.

(b) The imposition of discipline pursuant to this Part shall not preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing contained in this Part shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit bar associations from censuring, suspending or expelling their members from membership in the association or from admonishing attorneys in minor matters; provided, however, that such action by a bar association shall be reported to the appropriate committee appointed pursuant to section 691.4 (a) of this Part, and provided further, that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by this court or by a committee appointed pursuant to section 691.4(a) of this Part.

§ 691.2 Professional Misconduct Defined

Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege

to practice law, and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, as amended to May 1, 1978, or any canon of the Canons of Professional Ethics, as adopted by such bar association, or any of the special rules concerning court decorum, shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law.

Cross References

Judiciary Law, see McKinney's Book 29.

Code of Professional Responsibility, see Appendix to McKinney's Judiciary Law Book 29.

§ 691.3 Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction

(a) Any attorney to whom this Part shall apply pursuant to section 691.1 of this Part, who has been disciplined in another State, territory or district may be disciplined by this court because of the conduct which gave rise to the discipline imposed in such other State, territory or district.

(b) Upon receipt from the foreign jurisdiction of a certified or exemplified copy of the order imposing such discipline and of the record of the proceedings upon which such order was based, this court, directly, or by a committee appointed pursuant to section 691.4(a) of this Part, shall give written notice to such attorney pursuant to subdivision (6) of section 90 of the Judiciary Law, according him the opportunity within twenty days of the giving of such notice, to file a verified statement setting forth any defense to a discipline enumerated under subdivision (c) of this section, and a written demand for a hearing at which consideration shall be given to any and all defenses enumerated in said subdivision (c) of this section. Such notice shall further advise the attorney that, in default of such filing by him, this court will impose such discipline or take such disciplinary action as it deems appropriate.

(c) This court, in default of the attorney's filing a verified statement and demand as provided for in subdivision (b) of this section, may discipline such attorney unless an examination of the entire record before this court, including the record of the foreign jurisdiction and such other evidence as this court in its discretion may receive, discloses (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding of tile court in the foreign jurisdiction as to the attorney's misconduct; or (3) that the imposition of discipline by this court would be unjust.

(d) Opportunity for Hearing. Where an attorney shall have duly filed both his verified statement setting forth any defense (as enumerated in subdivision (c) of this section) to the imposition of discipline by this court and his written demand for a hearing with respect to such defense, no discipline, by way of suspension or otherwise, shall be imposed without affording the attorney an opportunity to have a hearing.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 691.4 Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure

(a) This court shall appoint; three grievance committees the the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters

arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b)(1) Each grievance committee shall consist of 19 members and a chairman, all of whom shall be appointed by this court and 16 of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments may be made from lists of prospective members submitted by the following county bar associations within the second judicial department: Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association, Inc., Suffolk County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees, appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his second such term. The person appointed chairman shall serve as chairman for a term of two years and

shall be eligible for reappointment as chairman for not more than one additional term of two years.

(3) The members of the joint bar association grievance committees as volunteers are expressly authorized to participate in a state-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may be commenced *sua sponte* by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chariman Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such actions;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has

been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5) of subdivision (e) of this section, if, after preliminary investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the person concerned either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall file a written answer at the time and place designated in the notice and the committee or a subcommittee shall proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and he heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing. the committee

shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall he filed with this court along with any majority report and the written report of the subcommittee. Upon such filing, the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.

(k) Disciplinary proceedings shall be granted preference by this court.

(l)(1) An attorney who is the subject of an investigation, or of charges by a Grievance Committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 691.3(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Grievance Committee made in

connection with any investigation, hearing, or disciplinary proceeding, or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or

(iii) other uncontroverted evidence of professional misconduct.

(2) The suspension shall be made upon the application of the Grievance Committee to this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law. The court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the Committee have been concluded, and until further order of this court.

Cross References

Judiciary Law, see McKinney's Book 29.
Public Officers Law. see McKinney's Book 46.

§ 691.5 Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath

(a) Upon application by the chairman or acting chairman of any such committee, or upon application by counsel to such committee, disclosing that such committee is conducting an investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas, in the name of the presiding justice, for the attendance of witnesses and the production of books and papers before such committee or such counsel, or any subcommittee thereof designated in such application, at a time and place therein specified.

(b) Any such committee or a subcommittee thereof is empowered to take and cause to be transcribed the evidence of

witnesses who may be sworn by any person authorized by law to administer oaths.

§ 691.6 Reprimand; Admonition; Letter of Caution; Confidentiality

(a) The chairman or acting chairman of any such committee may, after investigation and upon a majority vote of the full committee, issue a reprimand or an admonition or a letter of caution in those cases in which professional misconduct, not warranting proceedings before this court, is found. A reprimand is discipline imposed after a hearing. An admonition is discipline imposed without a hearing. A letter of caution may issue when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment. In cases in which an admonition or a letter of caution is issued, the attorney to whom such admonition or letter of caution is directed may, within 30 days after the issuance of the admonition or letter of caution, request a hearing before the committee or a subcommittee thereof, and after such hearing, the committee shall take such steps as it deems advisable. In cases in which a reprimand is issued, the attorney to whom such reprimand is issued, may within 30 days of the issuance of the reprimand, petition this court to vacate the reprimand. Upon such petition, this court may consider the entire record and may vacate the reprimand or impose such other discipline as the record may warrant.

(b) A copy of any reprimand or admonition or letter of caution given pursuant to this section shall be filed with this court.

(c) A confidential record of the proceedings resulting in such reprimand or admonition or letter of caution shall be permanently maintained by such committee (except that the complainant shall be notified of any reprimand or admonition or letter of caution which has become final and is not subject to further review) and may be considered in determining the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney subsequently.

(d) The provisions for confidentiality contained in this or any other section of this Part are not intended to proscribe the free interchange of information among the committees.

§ 691.7 Attorneys Convicted of Serious Crimes; Record of Conviction Conclusive Evidence

(a) Upon the filing with this court of a certificate that an attorney has been convicted of a serious crime as hereinafter defined in a court of record of any State, territory or district, including this State, this court shall cause formal charges to be made and served upon the respondent and shall enter an order immediately referring the matter to a referee, justice or judge appointed by this court to conduct forthwith disciplinary proceedings, whether the conviction resulted from a plea of guilty or *nolo contendere* or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(b) The term "serious crime" shall include any felony, not resulting in automatic disbarment under the provisions of subdivision (4) of section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft an attempt or a conspiracy or solicitation of another to commit a "serious crime" or a crime involving moral turpitude.

(c) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him based on the conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

(d) Upon the filing with the court of a certificate that an attorney has been convicted of a crime not constituting a serious crime as hereinbefore defined in a court of record in any State, territory or district, including this State, this court shall either refer the matter to a committee appointed pursuant to section 691.4(a) of this Part for whatever action may be appropriate, or cause formal charges to be made and served upon the respondent and enter an order immediately referring the matter to a referee, justice or judge appointed by this court to conduct forthwith disciplinary proceedings, whether the conviction resulted from a plea of guilty or *nolo contendere* or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(e) The clerk of any court within the judicial department in which an attorney admitted to practice in this State is convicted of a crime shall within five days of said conviction forward a certificate thereof to the clerk of this court and to the clerk of the Appellate Division of the Supreme Court in the judicial department in which said person was admitted to practice.

(f) Any such committee, upon receiving information that an attorney to whom these rules shall apply pursuant to section 691.1 of this Part, has been convicted of a crime in a court of record of any State, territory or district, shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to this court. If the certificate has not been forwarded by the clerk, such committee shall obtain a certificate of the conviction and forward it to this court.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 691.8 Effect of Restitution on Disciplinary Proceedings

Restitution made by an attorney or on his behalf to a client for funds converted, or to reimburse him for losses suffered as a result of the attorney's wrongdoing, shall not be a bar to the commencement or continuance of disciplinary proceedings.

§ 691.9 Resignation of Attorneys Under Investigation

(a) An attorney who is the subject of an investigation into allegations of misconduct may tender his resignation by submitting to the appropriate committee appointed pursuant to section 691.4(a) of this Part an affidavit stating that he intends to resign and that:

(1) his resignation is freely and voluntarily rendered; he is not being subjected to coercion or duress; and he is fully aware of the implications of submitting his resignation;

(2) he is aware that there is pending an investigation into allegations that he has been guilty of misconduct, the nature of which shall be specifically set forth; and

(3) he acknowledges that if charges were predicated upon the misconduct under investigation, he could not successfully defend himself on the merits against such charges.

(b) Upon receipt of the required affidavit, such committee shall file it with this court, which may enter an order either disbarring him or striking his name from the roll of attorneys.

APPENDIX E
[CONDUCT OF ATTORNEYS--THIRD DEPARTMENT]
PART 806. CONDUCT OF ATTORNEYS

§ 806.1 Application

This Part shall apply to all attorneys who are admitted to practice, reside or have an office in, or who are employed or transact business in, the third judicial department.

§ 806.2 Professional Misconduct Defined

Any attorney who fails to conduct himself in conformity with the standards of conduct imposed upon members of the bar as conditions fur the privilege to practice law, and any attorney who violates any disciplinary rule of the Code of Professional Responsibility adopted by the New York State Par Association, as amended to May 1, 1978, or any other rule or announced standard of the court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law.

Cross References

Judiciary Law, see McKinney's Book 29.
Code of Professional Responsibility, see Appendix to McKinney's Judiciary Law, Book 29.

§ 806.3 Third Department Grievance Program

(a) Committee on Professional Standards. This court shall appoint a committee on professional standards for the Third Judicial Department, which shall consist of a chairman and twenty members, three of whom shall be non-lawyers. Appointment of lawyers shall, as far as practicable, be made equally from practicing attorneys in each of the judicial districts in the Third Judicial Department. Appointments shall be made after consultation with the committee for a term of three years. A vacancy shall be filled for the remainder of the term. No

person who has served two consecutive terms shall be eligible for reappointment until the passage of three years from the expiration of his second term. Seven members of the committee shall constitute a quorum and the concurrence of six members shall be necessary for any action taken. The chairman shall be named by the court upon recommendation of the committee. The chairman may appoint an executive committee consisting of at least one member of the committee from each judicial district. The committee shall adopt rules governing its procedure and shall file a copy with the court.

(b) Duties of Committee on Professional Standards. The committee shall (1) consider and cause to be investigated all matters called to its attention, whether by complaint or otherwise, involving alleged misconduct by an attorney in the third judicial department, (2) supervise the professional staff in the performance of its duties to the committee, (3) furnish the court quarterly statistical reports concerning the disposition of all matters before the committee and maintain such records as directed by the court, and (4) submit a proposed annual budget to the court for approval.

(c) Defense and Indemnification of Committee Members. Members of the committee on professional standards, as volunteers, are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(d) Professional Staff. The court shall, in consultation with the committee, appoint a professional staff and such supporting staff as shall be necessary. The chief attorney shall be authorized to disburse funds within the amounts appropriated and allocated. The expenses of the staff and committee shall not exceed the amounts segregated and assigned by the Office of Court Administration, and shall be incurred according to rules and regulations promulgated by that office.

(e) Duties of Professional Staff. The chief attorney, under the supervision of the committee, shall (1) answer and take

appropriate action respecting all inquiries concerning an attorney's conduct and (2) investigate all matters involving alleged misconduct by an attorney in the Third Judicial Department.

Cross References

Public Officers Law, see McKinney's Book 46.

§ 806.4 Procedure

(a) Investigation Generally. Investigation of professional misconduct may be commenced by the committee, through the chief attorney, upon receipt of a specific complaint, or by the committee on its own motion. Complaints must be in writing and signed by the complainant, but need not be verified. Prior to initiating an investigation on its own motion, the committee shall file as part of its record a written inquiry signed by the chief attorney, which inquiry shall serve as the basis for such investigation.

(b) Investigation by Chief Attorney. Before initiating an investigation of a specific complaint against an attorney, the chief attorney shall determine whether the allegations, if true, are sufficient establish a charge of professional misconduct. If deemed sufficient, the chief attorney shall forward a copy of the complaint to the attorney, together with a statement of the nature of the alleged professional misconduct and a request that the attorney furnish a written statement concerning the complaint, and shall advise the attorney that a copy of his statement may, in the discretion of the committee, be furnished to the complainant for reply. Attorneys shall be expected to cooperate with all investigations. As part of an investigation, the chief attorney may request an attorney to appear pursuant to written notice to be examined under oath by the chief attorney or a staff attorney, and may, when necessary, apply pursuant to subdivision (e) of this section for a subpoena directing the attorney to appear for such examination. Stenographic minutes of such examination shall be made and a transcript made available to the attorney

upon lids request and payment of the stenographic fees. If an attorney requests that an examination be conducted before a third person, the chairman of the committee shall designate a member of the committee as the person before whom the examination shall be held. Upon the conclusion of an investigation, the chief attorney shall make a report to the committee. An attorney who fails to comply with a subpoena directing him to appear for examination may, in the court's discretion, be suspended pending his compliance or until further order of the court.

(c) Action by committee. (1) If, after an investigation, the committee determines that no further action is warranted, the complaint shall be dismissed and the complainant and the attorney shall be so notified in writing; or, if the investigation was undertaken on the committee's own motion, the investigation shall be discontinued. If, after an investigation, the committee determines that a complaint warrants action, it may:

(i) direct that a disciplinary proceeding be commenced against the attorney; or

(ii) admonish the attorney, either orally or in writing, or both, if the acts of misconduct have been established by clear and convincing evidence and the committee determines in its discretion in light of all of the circumstances that the misconduct is not serious enough to warrant prosecution of a disciplinary proceeding; or

(iii) issue a letter of caution, if the acts of misconduct have been so established and the committee determines in its discretion in light of all the circumstances that the misconduct is not serious enough to warrant either prosecution of a disciplinary proceeding or imposition of an admonition; or

(iv) issue a letter of education, if the committee determines, in its discretion, that the actions of the attorney warrant comment.

(2) Prior to imposition of an admonition, the committee shall give the attorney 20 days' notice by mail of the committee's proposed action. If the attorney desires to challenge the committee's action, the attorney may demand that the committee institute a disciplinary proceeding. Such demand shall be made by letter, certified mail, return receipt requested, within 10 days from the date of mailing the notice of the committee's proposed action. In the event that the attorney makes no such demand, the committee may proceed with the admonition. In any disciplinary proceeding instituted pursuant to this paragraph, the court shall not be bound by the committee's determination to admonish the attorney but may impose such discipline as it determines to be warranted by the facts.

(3) No prior notice to the attorney is necessary for the issuance of a letter of caution. The attorney may, however, request reconsideration of the committee's action in issuing a letter of caution. Such request shall be made by letter, certified mail, return receipt requested, within 10 days from the date of the mailing of the committee's letter. The request shall be considered by a subcommittee consisting of the chairman and two other committee members designated by the chairman. If it is determined by a majority of the subcommittee that reconsideration is warranted, the matter shall be resubmitted to the committee. Upon reconsideration, the committee shall not be bound by its prior determination but may take such action, including imposition of a more severe sanction or institution of a disciplinary proceeding, as the committee may determine.

(4) When an attorney has been admonished or cautioned, the committee shall promptly notify the complainant of the action taken. The committee's records relating to its investigation and sanction shall be confidential. An admonition or letter of caution may be considered by the court and the committee in determining whether to impose discipline and the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney.

(d) **Protective Orders.** An attorney aggrieved by any investigation may apply to the court by affidavit, upon notice to the chief attorney in such manner as a justice of the court may direct, for a protective order denying, limiting, conditioning or regulating the use of any information being sought by the chief attorney.

(c) Subpoenas. If it appears that the examination of any person is necessary for a proper determination of the validity of a complaint, the chief attorney or the attorney under investigation may apply to the clerk of this court for issuance of a subpoena for the attendance of the person as a witness and for the production of relevant books and papers. Application for issuance of a subpoena shall be made by setting forth factual allegations showing the relevancy of the testimony, and of any books and papers specified, to the subject matter of the investigation. Subpoenas, which shall be entitled "In the Matter of the Invest, ration by the Committee on Professional Standards of the Professional Conduct of an Attorney", shall be issued by the clerk in the name of the presiding justice and may be made returnable at a time and place therein specified before the chief attorney or any member of the committee designated to conduct the examination. The committee, or a member thereof designated by the chairman, or the chief attorney or a staff attorney, is empowered to take and cause to be transcribed the testimony of a witness, who may be sworn by any person authorized by law to administer oaths. If the committee is required to obtain a subpoena in order to compel an attorney's appearance for examination, the attorney shall be required to reimburse the committee for the stenographic costs of the examination within ten days of being advised of the amount of such costs.

(f) Suspension of Attorneys Pending Consideration of Disciplinary Charges.

(1) An attorney who is the subject of an investigation into allegations of misconduct and who has been examined by the committee under oath or who is the subject of a disciplinary

proceeding commenced in this court pursuant to a petition filed under section 806.5 of this Part, or pursuant to a notice served under section 806.19(b) of this Part, may be suspended from the practice of law pending consideration of the disciplinary charges against the attorney upon a finding that the attorney is guilty of professional misconduct immediately threatening the Public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or

(ii) a substantial admission under oath to commission of an act or acts of such professional misconduct, or

(iii) other uncontroverted evidence of the misconduct.

(2) The suspension shall be made upon application of the committee to this court, after written notice of such application has been given to the attorney, and shall commence upon service on the attorney of an order of this court granting the application. The court shall briefly state the reasons for the suspension which shall continue until such time as the disciplinary matter has been concluded and until further order of the court.

(3) An order of suspension together with any decision issued pursuant to the provisions of this subdivision shall be deemed a public record. The papers submitted in connection with the application therefor shall be deemed confidential until such time as the disciplinary matter against the attorney has been concluded and the charges are sustained by the court.

§ 806.5 Disciplinary Proceedings

Upon determining that a disciplinary proceeding should be instituted, the committee shall file with the court the original petition and notice of petition with proof of service of one copy upon the attorney. Service of the petit on and notice shall initially be made by certified mail to the attorney's office address; if the attorney shall fail to answer or respond on or before the return date of the notice, a copy of the petition and

notice shall be served upon him personally. The court shall refer issues of fact to a judge or referee to hear and report. If no factual issue is raised, the court may, upon application of either party, fix a time at which respondent may be heard in mitigation or otherwise, or the court may refer the matter for such purpose.

§ 806.6 County Bar Association Grievance Committees

A county bar association, through a grievance or other similar committee, may entertain minor complaints concerning undue delay in rendering professional services, fee disputes, inadequate representation, or other similar matters, and shall promptly refer or forward all other complaints to the chief attorney. A county bar association shall complete an investigation and take final action within 60 days after receipt of a complaint. Within 16 days after the end of each calendar quarter, the president or grievance committee chairman of a County bar association shall send to the chief attorney a quarterly report in a form approved by the committee on professional standards, together with either the original or copies of all correspondence and other papers relating to such complaints as may be required in the report form or by the chief attorney.

§ 806.7 Attorneys Convicted of a Crime

Upon the filing with this court of a certificate of a felony conviction of an attorney, the court shall issue an order directing the attorney to show cause why an order should not be entered striking his name from the roll of attorneys pursuant to the provisions of subdivision 4 of section 90 of the Judiciary Law. Upon the filing of the record of conviction of an attorney convicted of a serious crime, as defined in subdivision 4 of section 90 of the Judiciary Law, the court shall issue an order suspending the attorney until a further or final order is made. An attorney who has been suspended may apply for reinstatement upon expiration of the period of suspension.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 806.8 Resignation of Attorneys

(a) An attorney who is the subject of a disciplinary proceeding or of an investigation into allegations of misconduct may resign by tendering his resignation to the court, together with an affidavit stating that he wishes to resign and:

(1) that he is acting freely and voluntarily and is fully aware of the consequences of his resignation;

(2) that he is aware of the pending investigation or disciplinary proceeding concerning allegations of misconduct, the nature of which shall be specifically set forth; and

(3) that he does not contest the allegations of professional misconduct and recognizes that his failure to do so precludes him from asserting his innocence of the professional misconduct alleged.

(b) If the court accepts an attorney's resignation, it shall enter an order of disbarment.

APPENDIX F
[CONDUCT OF ATTORNEYS--FOURTH DEPARTMENT PART 1022 RULES RELATING TO ATTORNEYS]

§ 1022.17 Professional Misconduct Defined

A violation of sections 1022.2, 1022.3, 1022.5 through 1022.16, inclusive, of this Part, or any disciplinary rule of the Code of Professional Responsibility adopted by the New York State Bar Association, as amended through April 29, 1978, or any other rule or announced standard of the court governing the conduct or attorneys, shall constitute professional misconduct within the meaning of section 90(2) of the Judiciary Law.

Cross References

Judiciary Law, see McKinney's Book 29.
Code of Professional Responsibility, see Appendix to McKinney's Judiciary Law, Book 29

§ 1022.18 Effect of Restitution on Disciplinary Proceedings

The restitution by an attorney of clients' funds converted or misapplied by him shall not bar the commencement or continuation of grievance or disciplinary proceedings.

§ 1022.19 Fourth Judicial Department Grievance Plan

(a) Committee Structure.

(1) There shall be the following special grievance committees for the Fourth Judicial Department: the Fifth District Committee, the Seventh District Committee and the Eighth District Committee. Members of each special committee are to be recommended by the presidents of the local bar associations in each district, with at least one member from each county in each district.

(2) Appointments, including a chairman for each district are to be made by the Appellate Division, Fourth Judicial Department. Each district committee shall consist of 21 members including a chairman, three of whom shall be nonlawyers, all residing in

their respective district. Six lawyers shall be appointed for a term of one year, six for a term of two years, and six for a term of three years. One nonlawyer shall be appointed for a term of one year, one for a term of two years, and one for a term of three years. Thereafter appointments shall be made for a term of three years, and no person who has served two consecutive three-year terms shall be eligible for reappointment until the passage of three years from the expiration of the second term. A vacancy shall be filled for the remainder of the term. Members of the special grievance committees for the Fourth Judicial Department, as volunteers, are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law

(b) Duties of Committee.

(1) Consider and cause to be investigated all matters called to its attention, whether by complaint or otherwise, involving alleged misconduct by an attorney in the respective judicial district ;.

(2) Maintain supervision over staff attorneys in the performance of their duties to the committee.

(3) Refer appropriate matters to hearing panels and act upon the final report submitted by the hearing panels.

(4) Refer appropriate cases directly to this court where public interest requires prompt action or the respondent is convicted of a felony or of a misdemeanor involving moral turpitude.

(5) Furnish to this court statistical reports concerning the processing and disposition of all matters before the respective committees; maintain such records as directed by this court; and file copies of procedural memoranda with this court and the Office of Court Administration.

(c) Staff Structure.

(1) A professional staff consisting of a full-time chief attorney and staff attorneys, all of whom shall be residents of the Fourth Department, shall be employed by the committee chairmen with the approval of the Appellate Division and the approval of the Office of Court Administration. The professional staff shall consist of the number provided for in the State budget of the Office of Court Administration. Clerical, investigative and secretarial staff shall be in such number as may be provided for in the State budget submitted by the Office of Court Administration, and shall be all classified in competitive positions.

(2) The chief attorney may employ secretarial, clerical and investigative personnel as provided for in the budget.

(d) Duties of Professional Staff.

(1) Answer and adjust inquiries about attorneys' conduct.

(2) Investigate and report on all matters involving alleged misconduct by an attorney in the Fourth Judicial Department.

(3) Dispose of all allegations of misconduct by any one of the following: dismissal by letter, letter of caution by chief attorney, letter of admonition by the committee, hearing before three-member hearing panel, formal disciplinary proceeding before the Appellate Division.

(e) Procedure.

(1) Investigation. Investigation of all matters shall be initiated by the chief attorney and conducted by the staff attorneys through any one or all of the following procedures:

(i) By requesting an attorney to furnish, within 14 days, written explanation concerning his or her professional conduct. After the attorney's answer is received, or after 14 days, the investigation may continue and include, among other things, requesting the attorney to furnish further explanation, sending a

copy of the attorney's answer to the complainant for comments, interviewing witnesses, obtaining various records and reports.

(ii) By written notice to the attorney to appear before the chief attorney or a staff attorney to be examined concerning' his or her professional conduct.

(iii) By subpoena, issued in the name of the court, duly served on the attorney, to appear before the chief attorney or a staff attorney to be examined concerning his or her professional conduct.

(2) Disposition; Mattters Not Warranting Hearings.

(i) If, upon investigation of a matter, the chief attorney or staff attorney, after consultation with the committee chairman, determines that the complaint is unwarranted, he or she shall dismiss the complaint by appropriate letter to the complainant and the attorney.

(ii) If, after investigation of a matter, the staff attorney determines that the matter should be concluded by a letter of caution, he or she shall, after consultation with the committee chairman and with the consent of the chairman, draft a proposed letter of caution and make such recommendation to the chief attorney. Where such action is indicated, the chief attorney shall issue, over his or her signature, a letter of caution to the attorney and appropriately advise the complainant of final action taken.

(iii) If, after investigation of a matter, the staff attorney determines that the matter should be concluded by a letter of admonition, he or she shall draft a proposed letter of admonition and make this recommendation to the chief attorney. The letter, after the attorney involved has had a clear opportunity to be heard, shall clearly state the improper conduct with reference to the evidence upon which the improper conduct is based and the applicable authority. The chief attorney, if he or she approves, shall make this recommendation to the committee which shall, if it approves, authorize the chairman to issue, over his or her

signature, a letter of admonition to the attorney and appropriately advise the complainant of final action taken on behalf of the committee. A letter of admonition may also be authorized to be issued by the committee based on final factual findings of a hearing panel in accordance with the following paragraphs concerning matters warranting hearings before hearing panels.

(3) Matters Warranting Hearings Before Hearing Panels.

(i) If, after investigation of a matter, the staff attorney determines that a panel hearing should be scheduled, he or she shall make written recommendation to the chief attorney setting forth a summary of the matter and proposed charges to be heard before a hearing panel. Where such action is indicated, the chief attorney shall make this recommendation to the committee chairman. If the chairman approves, he or she shall refer the matter to a three-member hearing panel, arrange a hearing date, select three hearing panelists from the committee, one member being designated as hearing chairman, and at least one member being designated from the respondent's county where practicable.

(ii) Hearings before a hearing panel shall be adversary in nature and the written hearing notice to the respondent attorney shall clearly and concisely state the alleged misconduct charged. The notice shall be furnished to the respondent attorney or a duly authorized representative by the chairman by certified mail, no less than 20 days before the date of the hearing, and shall inform him or her of the right to be represented by counsel, to cross-examine witnesses, to produce evidence and to show mitigating circumstances on his or her own behalf.

(iii) The respondent attorney shall be required to serve his or her answer on the chairman within 20 days after service thereof. If the respondent attorney fails to file an answer, the respondent attorney shall be subpoened to appear before the hearing panel and explain his or her failure to answer. If, in the opinion of the

majority of the hearing panel, his or her explanation is unsatisfactory, the charges shall be deemed admitted.

(iv) At the conclusion of the hearings the hearing panel hall promptly submit a written report to the committee setting forth the charges, the evidence and the factual findings of the hearing panel. After receiving the report, the committee may direct the hearing panel to hold further hearings, examine further witnesses, clarify findings of fact and take such other steps as are necessary for a proper disposition of the matter by the committee; or, on the basis of the hearing panel's final factual findings, dispose of the matter by dismissal, letter of admonition, or institution of a formal disciplinary proceeding.

(f) Formal Disciplinary Proceedings Before Appellate Division.

(1) Commencement of Proceedings. If, after investigation of a matter, the staff attorney determines that a *prima facie* case of serious misconduct' exists, public interest requires prompt action, or the respondent is convicted of a misdemeanor involving moral turpitude, he or she shall submit to the chief attorney a written summary of the matter and proposed charges. The chief attorney, if he or she concurs, shall present the matter to the committee with a recommendation that formal disciplinary proceedings be instituted in the court. If the committee concurs, after respondent has had a clear opportunity to be heard, it shall authorize the chief attorney to bring action instituting formal disciplinary proceedings in this court.

(2) Suspension of Attorneys Pending Consideration of Disciplinary Charges.

(i) An attorney who is the subject of an investigation into allegations of misconduct and who has been examined by the departmental grievance committee under oath or who has been subpoened before the grievance committee but has failed to so appear, or who is the subject of a disciplinary proceeding pending in the court pursuant to a petition filed under paragraph

(1) of this subdivision or pursuant to a notice served under section 1022.22(b) of this Part, may be suspended from the practice of law pending consideration of the disciplinary charges against the attorney upon a finding that the attorney is guilty of misconduct immediately threatening the public interest. Such a finding shall be based upon:

(a) the attorney's default in responding to the petition, notice or subpoena;

(b) the attorney having substantially admitted under oath to commission of an act or acts of professional misconduct; or

(c) other uncontroverted evidence of the misconduct.

(ii) The suspension shall be made upon application of the departmental grievance committee to this court after written notice of such application has been given to the attorney pursuant to Judiciary Law, section 90(6) and shall commence upon service of the attorney of an order of this court granting the application. The court shall briefly state the reasons for the suspension which shall continue until such time as the disciplinary matters have been concluded.

(iii) An order of suspension together with any opinion issued pursuant to the provisions of this section shall be deemed a public record. The papers submitted in connection with the application on therefor shall be deemed confidential until such time as proceedings against the attorney are concluded and the charges are sustained by the court.

(3) An attorney subject to formal disciplinary charges pursuant to paragraph (l) of this subdivision or a motion pursuant to paragraph (2) of this subdivision shall personally appear before this court on the return date of the matter and thereafter on any adjourned date, whether represented or unrepresented by counsel, unless previously excused by the court.

(g) Appeals.

(1) An attorney dissatisfied with a letter of caution received from the chief attorney may appeal to the committee. A letter of admonition issued by the committee may be appealed to the chairmen of the three district committees. All appeals shall be in writing to the chairman of the respective district committee at the address of the Fourth Department grievance committee office, and shall state the precise basis for the appeal.

(2) The chief attorney may appeal to the three committee chairmen from an adverse decision of the committee declining to approve the chief attorney's recommendation to issue a letter of admonition or to authorize institution of a disciplinary proceeding.

(3) At any time during investigation of alleged professional misconduct by an attorney, he or she may make application to the Appellate Division for any relief which he or she thinks justified. The application shall be by motion, with notice to the chief attorney.

(h) County and Local Bar Association Grievance Committee Duties. Chairmen of committees or a designated representative on grievances of all county and local bar associations, or their president if no chairman is in office, shall process all complaints received by a county or local bar association, by its committee on grievances, by its committee on investigation, ethics or similar designated committee, concerning the professional conduct of m attorney with respect to the following matters:

(1) regarding allegations of minor delay in the disposition of matters with no loss to l he client;

(2) regarding allegations of fee dispute. not representing extortionate proportions;

(3) regarding allegations of personality conflicts between lawyer and client; and

(4)regarding other minor matters.

(i) [Complaint Report]. The county or local association shall retain jurisdiction and, within 20 days of receipt of the complaint, mail to the Fourth Department grievance office a new complaint report, in the form prescribed by the chief attorney, and attach a copy of the complaint, the county or local bar association's letter to the complainant acknowledging the complaint, the county or local bar association's letter to the attorney requesting his explanation.

(j) [Investigation]. After these mailings, the county or local bar association may continue its investigation by further correspondence, telephone or in whatever manner it deems appropriate under the circumstances.

(k) [File and Status Report]. When a county or local bar association assumes jurisdiction over a complaint in the above four areas, their investigation and final action shall be concluded within 60 days from the date the complainant's letter was received, and the complete county or local bar association file shall be forwarded to the Fourth Department grievance office, with a status report, in a form prescribed by the chief attorney, accompanying the file unless the complaint involve; solely a dispute concerning a fee not representing extortionate proportions or indicative of a pattern or course of conduct and the parties have agreed to binding arbitration of the dispute before the county or local bar association, or otherwise have resolved the matter within 20 days of the receipt thereof. The file shall include the original complaint, all correspondence, memoranda, copies of any transcripts if testimony was taken of any person, and all other miscellaneous papers. At the end of the 60-day period, the district committee automatically has jurisdiction over the complaint unless the chief attorney extends the time for a specific period after the county or local bar, within the 60-day period, makes written request to the chief attorney for an extension of time and states the basis for the request.

(l) [Other Complaints]. All other complaints not constituting minor delay, fee disputes, personality conflicts, other minor matters, shall be mailed to the Fourth Department grievance

office as soon as possible, but in no event more than 20 days after receipt.

(m) [Quarterly Reports]. Within 15 days after the end of each calendar quarter, every county or local bar association's grievance chairman, or its president if no chairman is in office, shall mail to the Fourth Department grievance office a quarterly report in the form prescribed by the chief attorney. If no complaint was received, the quarterly report shall be filed with a notation to such effect.

Cross References

Judiciary Law, see McKinney's Book 29.
Public Officers Law, see McKinney's Book 46.

§ 1022.20 Disciplinary Proceedings, Unauthorized Practice Investigations

(a) Proceedings under this section shall be commenced by a verified petition and notice of petition unless the court or a justice thereof grants an order to show cause to be served in lieu of a notice of petition at a time and manner to be specified therein. Unless otherwise directed by the court, proceedings or motions under this section, or section 1022.23, 1022.24 or 1022.36 of this Part, shall be made returnable on the Tuesday of the second week that the court; is in session.

(1) The original and 10 copies of the notice of petition, together with the petition and affidavits specified in the notice, shall be filed with this court and a copy thereof served on the respondent at least 20 days prior to the commencement of the term of this court during which the petition is returnable.

(2) An original and 10 copies of the answer and supporting affidavits, if any, shall be filed and a copy thereof served, within 20 days thereafter.

(3) The original and 10 copies of a reply, together with supporting affidavits, if any, shall be filed and served at least one day prior to the return date.

(4) Motion papers under this section or section 1022.23, 1022.24 or 1022.36 shall be served as required by CPLR 2214. The original plus 10 copies of all moving and answering papers shall be filed no later than the Friday prior to the return date of the motion.

(b) Any factual issue raised by a respondent's answer shall be determined by the court and may be referred to a justice of the Supreme Court or a referee designated by the Appellate Division to hear and report without recommendation. If no such issue is raised, or after completion of the hearing and report on such issue, the Appellate Division shall fix a time at which the respondent is to be heard in mitigation or otherwise, unless he or she waives in writing his or her privilege so to be heard.

(c) The New York State Bar Association, a local bar association or an appropriate committee of either may move *ex parte* for an order directing a preliminary investigation of charges of the unauthorized practice of law, brought by or made to one of its officers, committees; counsel or members. Subpoenas shall be issued in the name of the presiding justice by the clerk of the Appellate Division, at the request of the bar association or committee or of the respondent, for the attendance of witnesses and the production of books and papers. Testimony under oath may be taken in any such investigation.

§ 1022.21 Attorneys Convicted of A Crime

(a) Upon the filing with the Appellate Division of a certificate of the conviction of an attorney of a serious crime, other than a felony, as defined in subdivision (b) of this section in a court of record in this State or any other state, territory or district, the court shall issue an order suspending the attorney until a further or final order is made pursuant to paragraph (g) of subdivision 4 of section 90 of the Judiciary Law, whether the conviction resulted from a plea of guilty or *nolo contendere* or from a

verdict after trial or otherwise and regardless of the pendency of an appeal. The court may refer the matter to the appropriate grievance committee for further investigation and appropriate disciplinary action after hearing both the attorney so convicted and the attorney for the Grievance Committee. If the crime is not a serious crime as defined in subdivision (b) of this section, the court may refer the matter to the appropriate grievance committee for appropriate disciplinary action.

(b) For purposes of this section, the term "serious crime" excludes any felony resulting in automatic disbarment under subdivision i of section 90 of the Judiciary Law, but shall mean any criminal offense denominated a felony under the laws of any state, district or territory, or of the United States which does not constitute a felony under the laws of this State, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

(c) For all crimes, including felonies, the certificate of conviction shall he conclusive evidence of the attorney's guilt of that crime in any disciplinary proceeding based thereon, and the attorney may not offer evidence inconsistent with the essential statutory elements of the crime. unless such evidence was not available at the time of conviction.

(d) The clerk of any court of record within this judicial department in which an attorney is convicted of a crime, including a felony, shall forward a certificate thereof to this court, within 10 days after the conviction. An attorney convicted of any crime in a court of record of the United States or of any state or territory or district, including this State, shall file a certificate thereof within 30 days thereafter as provided by Judiciary Law, section 90, subdivision 4, paragraph (c). The

chief attorney shall determine whether such certificate has been forwarded and, if not, shall obtain and forward the certificate.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 1022.22 Discipline of Attorneys for Misconduct in Other Jurisdiction

(a) An attorney who has been disciplined in another state, territory or district may be disciplined by the Appellate Division for the conduct which resulted in such actions.

(b) Upon receipt from the foreign jurisdiction of a certified or exemplified copy of the disciplinary order and of the record of the underlying proceedings, the Appellate Division shall give written notice to such attorney pursuant to section 90(6) of the Judiciary Law that he or she may file within 20 days thereafter any defense to discipline enumerated in subdivision (c) of this section. The notice shall also fix a time at which the attorney is to be heard in mitigation or otherwise, unless he or she waives in writing such privilege so to be heard. A copy of such notice shall be sent to the chief attorney.

(c) The Appellate Division, after completion of such hearing, or without a hearing if waived, may discipline the attorney unless the record before it including the foreign record and such additional evidence as it in its discretion may receive, discloses:

(1) that the procedure in the foreign jurisdiction deprived the attorney of due process;

(2) that there was such an infirmity of proof of misconduct that the court cannot accept the finding of the foreign court; or

(3) that the imposition of discipline would be unjust.

Cross References

Judiciary Law, see McKinney's Book; 29.

§ 1022.23 Incompetency or Incapacity of Attorney

(a) An attorney who is judicially declared incompetent or involuntarily committed to a mentalhospital shall, upon proper proof of the fact, be immediately suspended from the practice of law by the Appellate Division. A copy of the order shall be served upon the attorney, his or her committee and the director of the mental hospital as the court may direct.

(b) If the chief attorney, on his or her own motion or by reason of an attorney's contention, in a pending disciplinary investigation, petitions the Appellate Division to determine whether an attorney is incapacitated from practicing law by reason of mental infirmity or illness or of addiction to drugs or intoxicants, the court may take or direct whatever action it deems necessary to determine the incapacitation, including the appointment of medical experts to examine the attorney. The court shall give such notice as it finds necessary to the respondent attorney and may appoint counsel to aid in his or her defense. If the petitioner meets its burden of proving the respondent incapacitated, the court shall immediately suspend respondent from the practicing of law for an indefinite period and stay any pending disciplinary proceeding. Should the court determine that the attorney is not incapacitated, it may take appropriate action, including the resumption of any pending disciplinary investigation or proceeding

§ 1022.24 Appointment of Attorney to Protect Clients

(a) When an attorney is suspended or disbarred, or it appears in a proceeding under section 1022.23 of this Part that the attorney is unable adequately to protect the interest of his or her clients, the Appellate Division, upon such notice to the attorney his or her counsel and other representatives as it finds appropriate. may appoint one or more attorneysto examine the files of the suspended, disbarred or incapacitated attorney. The attorneys so appointed shall be empowered to take any action required to

protect the interest of the clients involved, with due regard to the interests of the respondent attorney.

(b) An attorney appointed pursuant to subdivision (a) of this section shall not disclose any information contained in any file without the consent of the client involved, except as required by the order of the Appellate Division.

(c) The Appellate Division shall fix the compensation of any attorney appointed pursuant to subdivision (a) of this section, and may direct that it be paid as a cost of the underlying disciplinary or incapacity proceeding.

§ 1022.25 Resignation of Attorneys Under Investigation

(a) An attorney under investigation for misconduct may resign from the practice of law by submitting to the Appellate Division an affidavit stating that he or she intends to resign and that:

(1) the resignation is freely and voluntarily rendered, without duress and in full awareness of the consequences of his or her act;

(2) he or she is aware of the pendency of an investigation into allegations of misconduct, the nature of which shall be set forth;

(3) he or she acknowledges that the material allegations of the complaint are true; and

(4) he or she is submitting the resignation because of no defense against the allegations.

(b) The court shall notify the chief attorney of the receipt of the resignation and enter an order disbarring the attorney on consent.

APPENDIX G
[DISTRICT COURTS REQUESTED POST ARGUMENT INPUT]

VIA TELEFAX

Hon. John Gleeson
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Gleeson:

July 7, 1995

Re: Paladin v. Finnerty, et al.

Docket No. CV-92-2792

This letter is submitted in response to questions raised during the June 30, 1995 oral argument of the parties' motions for summary judgment. With respect to defendants' suggestion that abstention may be appropriate, a review of the office file reveals that this issue was not raised in defendants' answer. It appears that defendants filed a motion to dismiss based solely on improper venue. That motion was resolved by an "order of transfer" dated June 5, 1992 (Cedarbaum, J.) which, on the agreement of the parties, transferred venue from the Southern to the Eastern District of New York.

Whether abstention is appropriate depends, in part, on whether state remedies are available. It is assumed, of course, that state remedies are adequate. See generally Mathews v. Eldridge, 424 U.S. 319 (1976). It is defendants' position that plaintiff has failed to establish a property or liberty interest.

Assuming such interest exists, however, the process which provides for a hearing and subsequent judicial review is all that the Constitution requires. It is a basic constitutional precept that to the extent a letter of caution may impinge a protected interest, a state judicial forum must be available to review the action. Letters of caution and education have, in fact, been reviewed in the state

courts. See Taub v. Committee on Professional Standards, 200 A.D.2d 74 (3d Dep't, 1994) and Matter of Anonymous v. Grievance Committee, 136 A.D.2d 344 (2d Dep't, 1988), appeal dis'd 74 N.Y.2d 889 (1984).

It would certainly seem, therefore, that a state remedy is available to plaintiff to review his claims. It would also seem certain that a party, as plaintiff, cannot ignore available remedies or, possibly, allow a state statute of limitations to run in order to create federal jurisdiction or overcome the important considerations which support abstention. The application of abstention is also intertwined with the original jurisdiction of the District Court, i.e., when state remedies are available, the party must complete all state avenues of review and apply for certiorari from the Supreme Court rather than seek collateral review in the District Court.

In any case, because abstention was not initially raised by defendants and discovery has now been completed, review of the

merits of plaintiff's claims may be warranted. As noted by the Court during oral argument, the letters of caution are maintained in a permanent, confidential file. To the extent that the letters may influence a future decision of the Grievance Committee concerning whether, in response to some future alleged conduct of plaintiff, to issue a cautionary letter or commence a disciplinary proceeding, is of no constitutional significance.

More specifically, any future prosecutorial decision to commence a disciplinary proceeding of the Committee is entirely discretionary. It would not, in any sense, be unconstitutional for the Committee to consider many factors, including prior letters of caution, when exercising this judgment. Should a disciplinary proceeding be commenced, the Committee would be required to establish the facts upon which the charges would be predicated. It is inconceivable that the letters of caution at issue herein could be used as evidence of future misconduct. Rather, future charges will stand or fall based on the facts relevant to the charges. Even in the unlikely event that the letters were relied upon either as evidence of misconduct or considered when imposing discipline, plaintiff would have the ability in that proceeding to challenge the use of the letters. Thus, should plaintiff engage in future conduct which results in the commencement of a disciplinary proceeding, plaintiff can advance any purported claims challenging that proceeding at that time. See generally District of Columbia v. Feldman, 460 U.S. 462 (1983).

It is respectfully submitted, therefore, that defendants' motion be granted and the complaint reissued.

RKD/maz

cc: David Golia Paladin, Esq.
P.O. Box 66
225 Horton Highway
Mineola, NY 11501

Very truly yours,
Robert K. Drinan
Acting Assistant Attorney
General In Charge

June 30, 1995

Hon. John Gleeson
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York

Re: Paladin v. Finnerty, CV92-2792
Matter of Abstention in light of Taub and Mildner

Dear Judge Gleeson:

In the above referenced matter, there was considerable discussion today concerning the matter of abstention, and as I understand it, Mr. Drinan may now submit papers in support of abstention. Unless his submission contains anything unforeseen, this shall serve as my response.

Aside from the lateness of the raising of this issue and the irreparable harm abstention at this point would cause, there are two lines of thinking relating to Taub v. Committee of Professional Standards, Third Judicial Department, 612 N.Y.S.2d 272 (1994) and Mildner v. Gulotta, 405 F.Supp 182 (1975) that underlie the reasons for abstention to be improper.

Taub was decided only last year, and has effect only in the Third Department, which also employs a different standard of proof in attorney disciplinary matters--their attorney discipline committees must use a clear and convincing standard of proof, while in the Second Department I believe attorney disciplinary committees use only a preponderance standard to support an ethics violation--an apparently uncodified standard concerning which their Chief Counsel seemed surprisingly uncertain. (ex.Y)

At the Supreme Court level, it was the Committee on Professional Standards (the attorney disciplinary authority in the Third Department) that moved to dismiss for lack of subject matter jurisdiction. The motion was granted.

To my knowledge, there is no Article 78 remedy available in the Second Department for judicial review of letters of caution and there never has been. In fact, the Supreme Court in Albany abstained because no remedy existed there until the Taub matter was appealed to the Appellate Division which then created one.

As of this writing, there is no reason to believe the Attorney General's assertions that there is any judicial appeal available in the Second Department to review a letter of caution. The rules only allow for an appeal of discipline. The only review for letters of caution is an "appeal" to the committee to reconsider--which in hearing form could expose any appellant to discipline. In my case, that is what Counsel Squires indicated he intended to do, to move for discipline, as stated in his conversation with my then attorney. (ex.O) Further, he intended to do it before the same committee that had already decided the matter once before without an interest in considering any defense. Finally, according to Chief Counsel Finnerty, letters of caution can be used against the attorney again in any future proceedings for similar conduct. (ex. J)

Thus, the "appeal" Mr. Drinan referred to in oral argument today was and remains to this day, what I would characterize as "meaningless" and in violation of the spirit and meaning of due process, and, as Your Honor pointed out, the existence of letters of caution on permanent file can have a material effect on an attorney's licensure for any alleged offense capable of repetition.

As to revisiting Mildner v. Gulotta, I agree with Your Honor that great deference should be given to a three judge panel. As to the issue of abstention, one must look to what each judge actually said. The "majority" judge, Judge Neaher, voted for abstention--describing attorney disciplinary proceedings as "judicial" not "administrative" in nature. *And which the U.S. Supreme Court*

completely reversed five years later in Supreme Court of Virginia, 446 U.S. 719 (1980) by characterizing attorney disciplinary proceedings as administrative rather than judicial. The "swing vote" judge, Circuit Judge Moore, who went along with Judge Neaher as to the result, voted to uphold on the merits--i.e. not abstain. The dissent, Judge Weinstein, voted to reverse--i.e. also not abstain, on the grounds that the attorney disciplinary system as it existed in New York then and as it has since continued unchanged, was unconstitutional because it denied attorneys the same procedural rights as every other litigant in the state. Thus, two of those judges actually voted not to abstain, and the major premise relied on by Judge Neaher has been reversed.

Therefore, to the extent that the law has changed some in the intervening years, I respectfully suggest that U.S. Supreme Court rulings in Supreme Court of Virginia (1980), Pulliam v. Allen (1984), and Hafer v. Melo, 112 S.Ct. 358 (1991) as they would now apply to the Mildner case, should not result in abstention in the instant case, but rather should turn Judge Weinstein's then stinging thirty page dissent into what ought to be today's law.

Respectfully submitted,

David Golia Paladin, Esq.
Plaintiff Pro Se

cc: Robert K. Drinan
Assistant Attorney General

July 21, 1995

Hon. John Gleeson
U.S. District Court, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Paladin v Finnerty, CV 92 2792

Dear Judge Gleeson,

Having just reviewed Mr. Drinan's letter on behalf of the defendants, I found it perplexing enough to merit some final comment to follow up on my own earlier letter of June 30, 1995. The defendants insist that there is adequate state judicial review available and that if there is a possibility of damage at a later date from these permanently maintained letters of caution, that the matter can be readdressed at that time. They also maintain that abstention or summary dismissal is appropriate. Neither position has merit.

The consequences of abstention or summary dismissal in defendants' favor are that an extraordinarily unwieldy burden would be placed on all similarly situated plaintiffs in the future who are caught up in these "quasi criminal" proceedings stemming from grievances of incarcerated complainants. This places an unacceptable price on lawyers' fundamental rights to due process. The whole meaning of the judicial process is circumvented by allowing the defendants to make one sided, non judicially reviewable, permanent *ex parte* decisions which they claim are OK because, though here they could have recommended otherwise, no actual "discipline" was imposed. If it is so important for the committee to make pronouncements and to posture in a way that reflects, privately or publicly, on a person's good name, then certain minimum process is in fact due. There is nothing wrong with state disciplinary lawyers giving other lawyers the same unequivocal "notice and opportunity to be

heard" before judgement that Your Honor's own federal district court disciplinary rules require.

Defendants make specific reference in their letter of July 7, 1995 to Taub v Committee on Professional Standards, 200 A.D.2d 74 (3d Dept., 1994) and Matter of Anonymous v. Grievance Committee, 136 A.D.2d 344 (2d Dept., 1988). What they say and imply should be carefully examined.

The main issue in both cases was not due process, but rather specifically dealt with first amendment infringement arising from attorney disciplinary proceedings that were based upon disciplinary code advertising restrictions. The defendant committee in Anonymous clearly stated at page 346: "this letter of caution will be considered in determining future discipline." The committees in both cases clearly claimed lack of subject matter jurisdiction as defenses, on which the court in Anonymous did not rule, and which the court in Taub carved out a limited exception. Finally, the opinion in Anonymous was written by the same Presiding Justice Mangano who later (in response to an informal inquiry by the state's Chief Judge) stated in the underlying matter presently before this Honorable Court that this plaintiff was "afforded complete due process." (attached)

Considerable weight must be given to Presiding Justice Mangano's official ruling in Anonymous upholding the action of his committee which "issued a `letter of Caution' to the plaintiff which stated, *inter alia*, that `in the event that other misconduct is brought to our attention, this LETTER OF CAUTION will be considered in determining the measure of future discipline.'" (page 346) This is the clearest official statement that a letter of caution ***will*** be used to effect a property right.

Significantly, both Taub and Anonymous deal only with "fundamental rights." Thus, tacitly, the defendants appear to be conceding that even if due process is not a fundamental right, that

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must have a jeopardized property interest in my license that gives rise to a right to a hearing in the state courts. Certainly they cannot be suggesting that I do not have a property right and therefore due process does not attach, and at the same time argue that I have a sufficient property right that the state courts take jurisdiction pursuant to Taub and Anonymous.
In the past four years defendants have both failed to timely ask for abstention, and now have failed to support a sound legal basis for abstention. In fact this Honorable Court specifically expressed great deference to Mildner v Gulotta, 405 F.Supp. 182 (1975) a case in which two judges voted not to abstain (Circuit Judge Moore, and District Judge Weinstein (dissenting)), while the majority opinion judge (District Judge Neaher) who felt abstention was appropriate because attorney discipline was a judicial function has since been specifically reversed by the U.S. Supreme Court in Supreme Court of Virginia, 446 U.S. 719 (1980).

Defendants' argument that a meaningful right to review of due process exists in the Second Department state courts is vaporous, not only in light of the fact that their rules do not provide for it, but moreso in light of Presiding Justice Mangano's letter to then Chief Judge Wachtler, and the Chief Judge's response. (attached) Therein also is a strong inference that *the Presiding Justice admits I am entitled to due process* by stating that that in fact is what I received. It is simply my contention that their idea of due process does not comport with federal due process. It remains my position that due process in "quasi criminal proceedings," as in criminal proceedings, must be a fundamental right that attaches from the outset.

Aside from all other issues raised, with regard to due process owed to attorneys I am asking this Honorable Court to look through the defendant's conflicting arguments of convenience and to address the real issues. I am asking this Honorable Court to rule on whether the administrative proceedings to which I was subjected in fact fully comport with federal requirements of fairness and with federal standards of due process.

Very truly yours,

David Golia Paladin

cc: Robert K. Drinan,
Assistant Attorney General

APPENDIX H
[DISTRICT COURT DECISION]

NOT FOR PUBLICATION
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

DAVID GOLIA PALADIN,

Plaintiff,

-against-
MEMORANDUM AND
ORDER

92-CV-2792 (JG)
FRANK FINNERTY, LAWTON SQUIRES, RUTHANN GEARY, CATHERINE T. ENGLAND, VICTOR LEVIN, MICHAEL F. SPERENDI, and the HONORABLE GUY MANGANO, in their official and individual capacities and in their successors in interest,

Defendants.
A P P E A R A N C E S:

DAVID GOLIA PALADIN, ESQ. P.O. Box 225 Horton Highway Mineola, New York 11501 Plaintiff Pro Se.

ROBERT K. DRINAN, ESQ.
Attorney General of the
State of New York
211 Station Road, 6th Floor
Mineola, New York 11501
Attorney for Defendants

JOHN GLEESON, United States District Court Judge: The plaintiff, David Golia Paladin, brings this action against individual members of the New York State Grievance Committee for the Second Judicial Department's Tenth Judicial District (the "Committee") and the Hon. Guy Mangano, Presiding Justice, in his capacity as Chief Administrative Officer of the Second Judicial Department. Paladin is a licensed attorney with a practice in Mineola, New York. He claims that the Committee

violated his constitutional rights when it issued two letters of caution to him for professional misconduct on November 3, 1988 and March 17, 1989.

Defendants have moved for summary judgment. Plaintiff has cross-moved for summary judgment and injunctive relief. For the reasons set forth below, defendants' motion is granted and plaintiff's motions are denied.

A. Background

Throughout 1986 and 1987, Paladin represented Peter Lawrence in matters related to a parole revocation hearing. Lawrence, who is not a party to this action, filed a formal complaint with the Committee on March 23, 1987 in which he alleged that Paladin mishandled his case. Specifically, he accused Paladin of misrepresentation, unprofessional conduct and ineffective assistance of counsel.

The Committee notified Paladin of Lawrence's Complaint and requested a formal response to Lawrence's allegations. Paladin did not respond to any of Lawrence's claims. By letter dated May 21, 1987, however, he notified the Committee that he would write to Lawrence to explain "the precarious position [Lawrence] is attempting to place himself in by pursuit of a grievance, and how such perceptions (sic) on his part could well jeopardize the possibility of any early parole release."

Paladin sent such a letter to Lawrence on May 26, 1987 (the "May 26th Letter"). The letter told Lawrence, in essence, that if he persisted in pursuing the grievance against Paladin, it could adversely affect Lawrence's chances for parole. Specifically, Paladin wrote that the more Lawrence pursued his allegations of incompetence by Paladin, "the more you waive (sic) this case and the issues of any IMPULSIVE TENDENCIES or INSTABILITY TRAITS under the noses of the people who decide your release date,[and] the more likely they will have second thoughts about releasing you."1

On June 3, 1987, the Committee told Paladin that its inquiry into Lawrence's grievance would be "strictly confidential," and once again requested that Paladin respond to Lawrence's complaint so that it could complete its investigation. Paladin then forwarded to the Committee a copy of the May 26th Letter as a response to its request.

After reviewing the May 26th Letter along with Lawrence's complaint, the Committee issued Plaintiff a letter of caution dated November 3, 1988 (the "First Letter of Caution"). Although the Committee found that there was insufficient evidence to support Lawrence's claims, it unanimously decided to sanction Paladin for threatening Lawrence in the May 26th Letter. It concluded that Paladin further wrote:

Mr. Lawrence, if you wish to go ahead with your complaint against me, go right ahead if whatever it is inside you dictates that you must. But please remember that pursuing the elements of your appeal which you wish pursued would leave you worse off than you are now. Further, unless you immediately indicate to me that you have changed your mind, period, pursuit of a grievance against me would place matters pertaining to you personally in issue-the INSTABILITY business-which could well blow up in your face and compromise your position before the parole board. 4 Paladin had improperly tried to threaten Lawrence by suggesting that filing a complaint against his attorney might adversely affect his parole hearing.

On November 28, 1988, Paladin appealed to the Committee for a reconsideration of the First Letter of Caution. Pursuant to Section 691.4(g)-(h) of the New York Rules of Court, the Committee instituted formal charges against Paladin and set a hearing date. Paladin then withdrew his request for hearing. He claims that he feared the Committee would issue a harsher sanction in retaliation to his challenge of its procedures. At the time of this motion, Paladin has failed to appeal the First Letter of Caution in the state system.

On December 7, 1988, the Committee initiated a separate, *sue sponte* complaint for Paladin's failure to re-register with the Office of Court Administration (the "OCA").2 The Committee had asked Plaintiff on several occasions to verify that he had reregistered with the OCA, but Paladin did not respond satisfactorily. Instead, a series of problematic communications followed the Committee's request for information. On December 22, 1988, Paladin informed the Committee that he was "in good standing" with the OCA as of December 8, 1988. OCA records, however, show that his re-registration materials were not post-marked until December 23, 1988 and were not processed until January 9, 1989. In a letter dated January 19, 1989, Defendant Squires informed Paladin that a clerk at the OCA had told him that Paladin was not yet registered. In fact, Paladin had re-registered by that date. Instead of providing the Committee with the proper paperwork to verify this, however, Paladin sent several letters to the Committee expressing his frustration. The Committee issued a second letter of caution on March 17, 1989 (the "Second Letter of Caution"). [Footnote] 2 In New York, all attorneys must register with the OCA biannually. N.Y. Jud. Law § 468(a) (McKinney 1996).

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At his deposition, Defendant Finnerty, Chief Counsel to the Committee, testified that if Paladin had asked for a review of the Second Letter of Caution, the complaint would have been dismissed in its entirety. Paladin, however, chose to challenge both of the letters of caution in federal court.

Paladin raises several constitutional claims. He argues that the First Letter of Caution was based on charges raised *sue sponte* by the Committee. He alleges that the Committee deprived him of his due process rights by reviewing the May 26th Letter without giving him notice or an opportunity to be heard before issuing the First Letter of Caution. Paladin also claims his Sixth Amendment right to confront his accuser, the Committee, was denied. Finally, Paladin argues that his First Amendment rights were infringed by the Committee's interference with his communications to his client. In connection with the Second Letter of Caution, Paladin claims his equal protection rights were violated because New York's disciplinary procedures vary according to which Judicial Department is involved.

New York Grievance Procedures In New York, the Appellate Division has exclusive jurisdiction over attorney disciplinary proceedings. N.Y. Judiciary Law §§ 90(1)-(2); see also Kuriakose v. Evans, 206 A.D.2d 481, 481 (2d Dep't 1994); Erdmann v. Stevens, 458 F.2d 1205, 1209 (2d Cir.), cert. denied, 409 U.S. 889. In the Second Department, the Grievance Committee assists the Court in overseeing attorney conduct and is authorized to investigate complaints against lawyers. 22 NYCRR § 691.4 (c). The Grievance Committee may issue a "letter of caution" when it believes that the attorney has "acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment." 22 NYCRR § 691.6(a). Even after it has dismissed the charges against an attorney, the Grievance Committee may still issue a letter of caution. NYCRR § 605.8 (b)(3)(II). A letter of caution is a confidential letter to an attorney's file and is not considered discipline. NYCRR § 605.8 (b)(2)(II). However, an attorney's entire disciplinary file may be considered in any future fitness action. 22 NYCRR § 691.6(c).

An attorney is able to appeal the Grievance Committee's decision to issue a letter of caution. Capoccia v. Committee on Professional Standards, 3d Judicial Dep't, 1990

WL 211189, at *4 (N.D.N.Y. 1990); see also Mason v. Departmental Disciplinary Comm., APP. Div. of the Sup. Ct. of N.Y., 1st Dep't, 894 F.2d 512, 516 (2d Cir.), cert. denied, 497 U.S. 1025 (1990). An attorney is entitled to a hearing with the Grievance Committee in which he or she may be represented by counsel. 22 NYCRR § 691.6(a). These proceedings are confidential. 22 NYCRR § 691.4(j). After this hearing, the Committee may dismiss the charges, confirm its previous decision or impose a harsher sanction. Id.

An attorney may appeal the Grievance Committee's final decision to the Appellate Division, 22 NYCRR § 691.1(b); N.Y. Jud. Law § 90 (6); see In re Holtzman, 78 N.Y.2d 184, cert. denied, 502 U.S. 1009 (1991); Taub v. Committee on Prof. Stds., 3d Jud. Dep't, 612 N.Y.S.2d 272 (3rd Dep't 1994), and may seek further recourse in the New York State Court of Appeals. Mildner v. Gulotta, 405 F. Supp. 182, 197 (E.D.N.Y. 1974). Finally, a claim brought in the state's highest court may be appealed to the U.S. Supreme Court. Mildner, 405 F. Supp. at 196 (citing Huffman v. Pursue, 420 U.S. 592, 605 (1975)); see also Olitt v. Murphy, 453 F. Supp. 354, 359 (S.D.N.Y.), aff'd, 591 F.2d 1331 (2d Cir. 1978), cert. denied, 444 U.S. 825 (1979).

C. Discussion

Plaintiff claims that the Committee's issuance of the two confidential letters of caution to his file constituted a deprivation of constitutionally protected interests without due process of law. In order to show a due process violation, plaintiff must identify a constitutionally cognizable right, show that the state has deprived him of that right, and show that the deprivation was effected without due process. Bd. of Regents of State College v. Roth, 408 U.S. 564, 570-71 (1972); Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994); Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990). Here, plaintiff claims that the issuance of two letters of caution violated his property

right in a license to practice law and his liberty right to a good reputation.

Property interests are created not by the Constitution, but by an independent sources, such as state law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). Therefore, I look to state law to determine the "existence and dimensions" of plaintiff's asserted property right and whether the asserted right constitutes a legitimate constitutional entitlement. Goetz v. Windsor Central School Dist., 698 F.2d 606, 608 (2d Cir. 1983). Once the existence of a protected interest is shown, I look to the allegations in the case to determine whether the interest has been deprived and whether due process was absent from the circumstances surrounding the deprivation.

Plaintiff contends that his right to a license to practice law is a protected property interest. (Plf. Memorandum at 17-18; Amended Complaint 100-101.) Implicit in Paladin's claim is the assertion that the issuance of the two confidential letters of caution to his file deprived him of this interest. I find, however, that even though Paladin has a protected interest in a license to practice law, there was no deprivation of this right by the issuance of letters of caution. Plaintiff has therefore not been deprived of property interest in this case.

A letter of caution is not discipline, nor does it have any effect upon a lawyer's ability to practice law. The issuance of such a letter does not suspend, revoke or otherwise call into question an attorney's license to practice. Furthermore, such a letter is confidential, sealed, and issued to an attorneys file, rather than published. The issuance of a letter of caution, therefore, does not in itself have any effect upon an attorney's right or ability to practice law. Cf. Goulding v. Feinglass, 811 F.2d 1099, 1103 (7th Cir.), cert. denied, 482 U.S. 929 (1987) (IRS agents' allegedly defamatory statements about a tax lawyer to the lawyer's clients did not deprive the lawyer of his property interest to practice law where his license was not revoked or suspended and he remained able to practice).

Although Paladin argues that the issuance of two letters of caution was improper in his case, a plaintiff must show more than the simple fact that he "has been wronged at the hands of a state or municipal official. Rather, a plaintiff must allege that he has been deprived of some right secured by a federal statute or the U.S. Constitution." Eastway Construction Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985), cert. denied, 484 U.S. 918 (1987); see also Paul v. Davis, 424 U.S. 693 (1976). Paladin has not, and indeed cannot, show that the issuance of these two confidential letters to his file has deprived him of his right to practice law or even impaired that right in any way. He cannot, therefore, maintain a cause of action predicated on a finding that a protected property interest has been deprived.

It is true that New York provides a number of procedural protections surrounding the issuance of a letter of caution. However, the Second Circuit has clearly stated that the existence of such procedural safeguards does not prove the existence of or 10 give rise to a substantive right. Yale Auto Parts Inc. v. Johnson, 758 F.2d 54, 58 (2d Cir. 1985) (citing cases). Similarly, a plaintiff cannot claim a protected interest in the procedures themselves without a corresponding protected substantive interest. See e.g., Fleury v. Clayton, 847 F.2d 1229, 1231 (7th Cir. 1988) ("There is neither a 'liberty' nor a 'property' interest in procedures themselves"); Villanova v. Abrams, 972 F.2d 792, 798 (7th Cir. 1992) (The creation of a particular process creates no additional protected interest).

Plaintiff argues that his liberty interest in a good reputation has been similarly deprived by the defamatory effect of the letters of caution. However, the issuance of confidential letters of caution, sealed and sent to plaintiff's file, cannot cause an injury to reputation for the simple reason that the content of the letters were never published by the state.3 Indeed, plaintiff has pointed to no dissemination of damaging statements about him which could conceivably have injured his reputation or limited his ability to practice law. He has therefore failed to allege a deprivation of a good reputation. Senape v. Constantino,

936 F.2d 687, 691 (2d Cir. 1991) (publication is "an essential element" to deprivation of liberty).

Second, even if plaintiff had shown official publication of the letters of caution, this alone would not support a claim Plaintiff himself has chosen to make public the existence and content of these letters by bringing this action and filing the letters with the court. He cannot reasonably allege that responsibility for such publication lies with the defendants, that a been denied. Other courts have found that even actual injury protected interest had to reputation does not necessarily show a denial of due process. See, e.g., Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (lOth Cir. 1989) (publication of false articles about an attorney which interfered with attorney's business opportunities did not state a claim for denial of due process); Rogers v. Berger, 682 F. Supp. 302 (W.D. Va. 1988) (allegations that an attorney was named as a co-conspirator in an indictment that became part of public record, thereby harming the attorney's good name, did not state a claim of deprivation of a constitutionally protected interest). In order to show a deprivation of a protected liberty interest, a plaintiff must show that alleged defamation occurred "in the course of dismissal or alteration of some other legal right or status." Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir.), cert. denied, 493 U.S. 816 (1989); see also O'Neill v. City of Auburn, 23 F.3d 685 (2d Cir. 1994); Martz v. Incorporated Village of Valley Stream, 22 F.3d 26, 32 (2d Cir. 1994); Easton v. Sundram, 947 F.2d 1011 (2d Cir. 1991), cert. denied 504 U.S. 911 (1992). Applying this principle, district courts in this circuit have found no deprivation of a plaintiff's protected liberty interest even in circumstances where allegedly false statements resulted in the loss of plaintiff's job. See Brucciani v. New York Tel., 1992 WL 162823 (S.D.N.Y. 1992); Katz v. Molic, 727 F. Supp. 114 (S.D.N.Y. 1989), aff'd, 909 F.2d 1473 (2d Cir. 1990). Therefore, even if plaintiff had shown that the letters of caution had been publicized, such publication would not amount to a deprivation of a protected

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interest in this case. Since Paladin has failed to allege the deprivation of a constitutionally protected property or liberty interest, his due process claim cannot stand.4 Paladin's First Amendment, Sixth

This case also presents an interesting abstention issue under Younger v. Harris, 401 U.S. 37, 42 (1971). Even if Paladin had stated a cognizable claim for deprivation of a property or liberty right without due process of law, Younger may well apply to this case, requiring my abstention.

Under Younger, a federal court may not intervene in state court proceedings except in extraordinary circumstances. Erdmann, 458 F.2d at 1208. In Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982), the Supreme Court applied Younger abstention in a case concerning attorney disciplinary proceedings. Although an exception exists under Younger if the party seeking federal review shows the existence of bad faith or retaliatory prosecution that will result in irreparable harm, Younger, 401 U.S. at 44; Cullen v. Fliegner, 18 F.3d 96, 103 (2d Cir.), cert. denied, 115 S.Ct. 480 (1994), this exception would be inapplicable to Paladin's case. Paladin has **still** failed to show the **requisite** bad faith that would warrant automatic federal intervention. Nor is his case one in which Younger abstention is inappropriate. Under Younger, a federal court should abstain from exercising its jurisdiction where federal review would disrupt state proceedings that: (1) are pending; (2) implicate important state interests; and (3) provide the plaintiff an adequate opportunity to litigate federal claims. See Hansel v. Town Ct. for Town of Springfield, 56 F.3d 391, 393 (2d Cir.), cert. denied, 116 S.Ct. 572 (1995) (citing Middlesex, 457 U.S. at 432); Cecos Int'l, v. Jorling, 895 F.2d 66, 70 (2d Cir. 1990). In this case, the requirements of Younger are adequately satisfied.

First, the disciplinary proceeding against Paladin is ongoing, not yet exhausted and "judicial in nature." Middlesex, 457 U.S. at 434; Levy v. Lerner, 853 F. Supp. at 641 (citing Huffman v. Pursue, 420 U.S. 592, 608 (1975)). Second, the

disciplinary proceedings in this case involve a vital state interest. Middlesex 457 U.S. at 435 (a state has an "extremely strong interest in maintaining and assuring the professional conduct of the attorneys it licenses"). Federal review of disciplinary procedures would disrupt legitimate state court jurisdiction. Erdmann, 458 U.S. at 1295 (attorneys should not be able to undermine disciplinary proceedings by enjoining them in federal courts). Finally, the third prong of the Younger test is satisfied since Paladin's constitutional claims can be adequately

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reviewed in state court, see Hansel, 56 F.3d at 393, and therefore should he heard in that forum.

Amendment and equal protection claims are devoid of merit. For these reasons, defendants' motion for summary judgment is granted, and Paladin's cross motion and his request for injunctive relic are denied.

So Ordered.

John Gleeson
United States District Judge

Dated: March 28, 1996
Brooklyn, New York

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of December, one thousand nine hundred and ninety-six.

PRESENT: HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,

Circuit Judges.

DAVID GOLIA PALADIN,

-v. Plaintiff-Appellant,

-v.-

96 -7463

FRANK FINNERTY, Chief Counsel; LAWTON SQUIRES, Assistant Counsel; RUTHANN GEARY, Assistant Counsel; CATHERINE T. ENGLAND, Chairwoman for the Second Judicial Department's 10th Judicial District, in their official and

individual capacities, and in their successors in interest; VICTOR LEVIN and MICHAEL F. SPERENDI, former Chairmen of the Committee on Grievances, Bar Association of Nassau County, New York, Inc., in their official and individual capacities, and in their successors in interest; ROBERT H. STRAWS, Chief Counsel, New York State Grievance Committee for the Second Judicial Department's 10th and 11th Judicial Districts, in his official and individual capacity and in his successor in interest; GARY CASELLA, Chief Counsel for the New York State Grievance Committee for the Second Judicial Department's 9th Judicial District, in his official and individual capacity and in his successor in interest; HONORABLE GUY J. MANGANO, Presiding Justice in his capacity as Chief Administrative Officer of the Second Judicial Department, in his individual and official capacity and in his successor in interest; MARK OCHS, Chief Attorney, Committee on Professional Standards for the Third Judicial Department, in his individual and official capacity and in his successor in interest; HONORABLE A. FRANKLIN MAHONEY, Presiding Justice in his capacity as Chief Administrative Officer of the Third Judicial Department in his official and individual capacity and in his successor in interest; GERALD LARUSSO, Chief Attorney, Attorney Grievance Committee for the Fourth Judicial Department, in both his official and individual capacity and in his successor in interest; HONORABLE JOHN CALLAHAN, Acting Presiding Justice in his capacity as Chief Administrative Officer of the Fourth Judicial Department, in his official and individual capacity and in his successor in interest; HAL R. LIEBERMAN, Chief Counsel, Department Disciplinary Committee for the First Judicial Department, in his official and individual capacity and in his successor in interest; HONORABLE FRANCIS T. MURPHY, Presiding Justice in his capacity as Chief Administrative Officer of the First Judicial Department, in his official and individual capacity and in his successor in interest; MATTHEW T. CROSSON, Chief Administrator of the Courts for the State of New York ("Office of Court Administration" or "OCA"), in his official and individual capacity and in his successors in interest,

Defendants-Appellees.

APPEARING FOR PLAINTIFF-APPELLANT:

APPEARING FOR DEFENDANTS-APPELLEES:

DAVID GOLIA PALADIN, ESQ., Mineola, NY, pro se.

ROBERT K. DRINAN, Assistant Attorney General (Dennis C. Vacco, Attorney General) Mineola, NY.

Appeal from the United States District Court for the Eastern District of New York (Gleeson, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued pro se.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED.**

David Golia Paladin appeals from an order of the Eastern District of New York (Gleeson, J.), denying his motion for summary judgment and granting defendants' motion for summary judgment.

Paladin is a lawyer admitted to the New York Bar. His lawsuit arises out of two letters of caution sent by the New York State Grievance Committee for the Tenth Judicial District. In the Second Judicial Department of New York, the Grievance Committee is authorized to investigate complaints against lawyers, 22 NYCRR § 691.4(c), and may issue letters of caution when it believes that a lawyer has "acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment." 22 NYCRR § 691.6(a). A letter of comment is not a disciplinary measure, and remains confidential, NYCRR § 605.8(b)(2)(II), but may be considered in future

disciplinary or fitness actions, 22 NYCRR § 691.6(c). Final decisions of the Grievance Committee may be appealed to the Appellate Division, N.Y. Jud. Law § 90(6), the New York Court of Appeals, and the United States Supreme Court, Mildner v. Gulotta, 405 F. Supp. 182, 196, 197 (E.D.N.Y. 1974).
Paladin's first letter of caution stems from his representation of Peter Lawrence in matters related to a parole revocation hearing. Lawrence filed a formal complaint against Paladin with the Grievance Committee in March of 1987, alleging misrepresentation, unprofessional conduct, and ineffective assistance of counsel. The Grievance Committee reviewed the matter and issued a letter of caution on November 3, 1988, primarily because Paladin had threatened his client by letter with an adverse outcome in the parole revocation hearing as a result of Lawrence's grievance filing.

Paladin appealed for reconsideration of the letter on November 28. The Grievance Committee instituted formal charges and set a hearing date, but Paladin withdrew the request before the hearing took place. Paladin pursued no further appeal.

The second letter of caution resulted from Paladin's failure to re-register with the Office of Court Administration, as required by N.Y. Jud. Law § 468(a). The Grievance Committee initiated a sua sponte complaint on this basis on December 7, 1988. On December 23, 1988, Paladin wrote a check for the overdue amount, which was cashed on January 11, 1989. Because Paladin was required to re-register in July 1988, but did not do so until December at the earliest, the Grievance Committee sent Paladin a second letter of caution on March 17, 1989. The Chief Counsel to the Committee indicated at his deposition that the complaint concerning the failure to re-register would have been dismissed in its entirety if only Paladin had appealed the resulting letter of caution, which Paladin never did.

Instead, Paladin filed a complaint in the Eastern District of New York, alleging that the Grievance Committee's issuance of the two letters of caution violated a bunch of constitutional rights, including due process, equal protection, the First Amendment,

and the Sixth Amendment. In an Memorandum and Order dated March 28, 1996, the district court granted defendants' motion for summary judgment, denied Paladin's cross-motion for summary judgment, and denied Paladin's request for injunctive relief. This appeal followed.

On appeal, Paladin reiterates many of the arguments he made before the district court. He contends that the district court failed to recognize that: 1) the letters of caution deprived him of protected property rights without due process of law; 2) the differences in disciplinary rules and procedures among the four departments deprived him of equal protection; 3) the second letter of caution amounted to retaliation for his questioning of the procedures of the first letter of caution, in violation of the First Amendment; and 4) the Grievance Committee's nondisclosure of the complainant's identity violated Paladin's Sixth Amendment right of confrontation.

In order to make out a due process violation, Paladin must 1) identify a constitutionally cognizable right, 2) show that the state has deprived him of that right, and 3) show that the deprivation was effected without due process. Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994); Mehta v. Surles, 905 F.2d 595, 598.

Paladin argues that he was deprived of his "quasi-property right to notice and an opportunity to be heard at the outset." Because he did not raise this argument below, we do not address it. He argued below that his right to a license to practice law constitutes a protected property interest. We need not address the question of whether a license to practice law can be a property right, because this right was never at stake. The letters of caution did not deprive Paladin of any such right. To the extent that he was anxious about such a future possibility, he was free to proceed with the hearing afforded by the Grievance Committee's procedures. At oral argument, Paladin said that he abandoned that avenue of relief because he viewed the second letter of caution as retaliation for his having dared to question the first letter of caution. This is nonsense. It is undenied that Paladin

indeed failed to re-register with the OCA in a timely manner; it cannot be said that there was any impropriety on the part of the Grievance Committee in enforcing that requirement. Lawyers cannot insist or require that the Grievance Committee consider their defaults and shortcomings one at a time.

Finally, if the second letter of caution violated the First Amendment, as Paladin asserted at argument, he was free to pursue relief under Article 78 of the New York Civil Practice Law and Rules. Paladin offers no explanation for his failure to do so. Under these circumstances, there is no reason to believe that there was the slightest failure of due process in this case regarding either the first or second letter of caution. Paladin's Equal Protection and Sixth Amendment claims are no better.

We have examined all of Paladin's contentions, and find them to be without merit. For the reasons set forth above, the judgment of the district court is AFFIRMED.

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J

DENNIS JACOBS, U.S.C.J.

GUIDO CALABRESI, U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

APPENDIX J
[1992 REPORT ON THE STATE OF DISCIPLINE IN NEW YORK STATE]

New York State Bar Association

Committee on
Professional Discipline

The State of Discipline
in New York State

Annual Report for the Year 1992

One Elk Street, Albany, New York 12207

Principal among these other issues is the need to bring about far greater uniformity and efficiency in the handling of disciplinary matters. At present, the policies and procedures of the State's official agencies of discipline are significantly different. Regrettably, one of the few points of uniformity among these various agencies is the inordinate delay that each has experienced in processing complaints of misconduct.

The fact that, historically, each of the Appellate Division's four departments has exercised autonomous authority over matters of professional discipline does not inevitably condemn the system to widely varying standards It makes no sense, for example, for the terminology used to describe the same level of sanction to vary from department to department. It makes even less sense for the same language to be used to describe

functionally different sanctions. A so-called "Letter of Caution" should not be considered a form of discipline in one department but not in another. An "Admonition" should not be reserved to the official agencies of discipline in one department and issued by private bar associations in another.

It is obvious to the most casual observer that the system has been allowed to develop patchwork, with little regard for consistent statewide standards. The Appellate Division's recent efforts to adopt various procedures by joint order, though helpful and clearly pointed in the right direction, do not undo the decades of autonomous departmentalized development.

We know that any study to address the nature and extent of change necessary to accomplish significant improvement in New York will perforce be obliged to address the historical allocation of authority among the four departments of the Appellate Division. If it is proposed that departmentalization be compromised in any way, to be credible, such proposals must be grounded in experience. Theory, symbolism and assumptions about the public's distaste for the current system are not substitutes for a critical analysis of our actual experience in New York.

The real issue is not whether we should publicize unproven allegations, but how we can make the system work more efficiently to determine with far greater alacrity than at present whether those allegations have merit:

Frank R. Rosiny
Chair

APPENDIX K

[*SUA SPONTE* REGISTRATION COMPLAINT AND IT'S SUBSEQUENT LETTER OF CAUTION NUMBER TWO]

December 7, 1988
PERSONAL & CONFIDENTIAL

David Golia Paladin, Esq.
225 Horton Highway

P.O. Box 66
Mineola, N.Y. 11501
Re: File No. N-1561-88

Dear Mr.Paladin.:

In connection with a recent inquiry, we have ascertained that Office of Court Administration records reflect no re-registration by you pursuant to Judiciary Law Section 468-a.

A sua sponte complaint is therefore being initiated against you by the Grievance Committee for the Tenth Judicial District in accordance with the provisions of section 691.4(c) of the Rules of the Appellate Division, Second Judicial Department.

We would suggest that you immediately comply with the statute by writing the Office of Court Administration at 80 Centre Street, New York, N.Y. 10008, and requesting the necessary registration form. Kindly submit your written response to this office within fifteen (15) days of any explanation you may have for your non-compliance, along with verification of your registration.

Very truly yours,

LAWTON W. SQUIRES
Assistant Counsel
LWS:GL

[APPENDIX K CONTINUED]

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICAL DISTRICT

900 ELLISON AVENUE
SUITE 304
WESTBURY, N.Y. 11590
(516) 832-8585

HON. CATHERINE T. ENGLAND
CHAIRWOMAN
[SEAL]

FRANK A. FINNERTY, JR.
CHIEF COUNSEL
GRACE D. MORAN
DEPUTY COUNSEL
ANNE L. POWERS
ASSISTANT COUNSEL
MURIEL L. GENNOSA
ASSISTANT COUNSEL
RUTHANN E. GEARY
ASSISTANT COUNSEL

March 17, 1989

David Golia Paladin, Esq.
P. O. Box 66
225 Horton Highway
Mineola, NY 11501

Re: File No. N-1561-88

Dear Mr. Golia Paladin:

Please be advised that at its regularly scheduled meeting on March 8, 1989, the Grievance Committee for the Tenth Judicial District considered the sua sponte complaint opened against you. The complaint involved the allegation that

you failed to timely and properly re-register as an attorney, with the Office of Court Administration.

The Committee's investigation disclosed that you failed to timely re-register as an attorney until this Committee was forced to open a sua sponte complaint against you.

It was the decision of the Committee that pursuant to Section 691.4(e)(2) of the Appellate Division Rules, Second Department, that you be issued this LETTER OF CAUTION.

This letter is issued in accordance with the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department, Section 691.6, to which you should refer concerning your rights thereunder.

Very truly yours,
CATHERINE T. ENGLAND
Chairwoman

CTE:LWS:emh

Certified Mail:R.R.R.

APPENDIX L
[LETTER OF CAUTION NUMBER ONE ISSUED WITHOUT NOTICE AND WITHOUT SUA SPONTE COMPLAINT]

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT

900 Ellison Avenue
Suite 304
Westbury, N.Y. 11590
(516)822-8585

Hon. CATHERINE T. ENGLAND
CHAIRWOMAN

[SEAL]

FRANK A. FINNERTY, JR.
CHIEF COUNSEL
GRACE D. MORAN
DEPUTY COUNSEL
MURIEL L. GENNOSA
ASSISTAN COUNSEL
RUTHANN E. GEARY
ASSISTANT COUNSEL

NOVEMBER 3, 1988

Personal and Confidential

David Golia Paladin, Esq.
P. O. Box 66
225 Horton Highway
Mineola, NY 11501
Re: File No. N-391-87

Dear Mr, Paladin:

On October 5, 1988, the Grievance Committee for the Tenth Judicial District, considered the complaint filed against you by Peter Lawrence.

Investigation revealed that by letter dated May 26, 1987, addressed to Mr. Lawrence you stated that:

"Mr. Lawrence, if you wish to go ahead with your complaint against me, go right ahead if whatever it is inside you dictates that you must. But please remember that pursuing the elements of your appeal which you wish pursued would likely leave you worse off than you are now--which is why I wrote my letter of 10/22/86. Further, unless you immediately indicate to me that you have changed your mind, period, pursuit of a grievance against me would place matters pertaining to you personally in issue--the INSTABILITY business--which could well blow up in your face and compromise your position before the Parole Board."

It was the decision of the Committee that pursuant to Section 691.4(e)(2) of the Rules of the Appellate Division of the Supreme Court, Second Department, you be issued this LETTER OF CAUTION for threatening a client that his filing a complaint against you, with the Grievance Committee, will have a detrimental effect on the outcome of his appeal.

This threat is in violation of DR 9-101(c) of the Code of Professional Responsibility

This letter is issued in accordance with the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department, Section 691.6, to which you should refer concerning your rights thereunder.

Mr. Lawrence will not receive a copy of this letter, but will be advised that appropriate action has been taken in the form of a private admonition.

Very truly yours,
CATHERINE T. ENGLAND
Chairwoman

CTE:REG emh Certified Hail: R.R.R.

State of New
York

APPENDIX M
[LETTER DISMISSING ALL OF COMPLAINANT'S ALLEGATIONS]

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT
900 ELLISON AVENUE
SUITE 304
WESTBURY, N.Y. 11590
[SEAL]

November 29, 1988

David G. Paladin, Esq.
P. O. Box 66
225 **Horton Highway**
Mineola, NY 11501

Re: File No. N-391-87

Dear Mr. Paladin:

This will acknowledge receipt of your letter dated November 9, 1988, addressed to Hon. Catherine T. England, Chairwoman.
At its meeting, the Committee found that there was insufficient evidence to support the complainant's allegations of professional misconduct against you. However, as you are aware from the letter dated November 3, 1988, the Committee unanimously directed that you be issued a Letter of Caution for threatening retaliation as a result of the complainant's having filed a complaint against you.

/s/ FRANK FINNERTY
Frank Finnerty
Chief Counsel

FAF/jdw

APPENDIX N

[LETTER FROM PRESIDING JUSTICE MANGANO TO CHIEF JUDGE WACHTLER]

Appellate Division
Supreme Court of the State of
New York
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201

July 2, 1991

Hon. Sol Wachtler, Chief Judge
New **York Court of Appeals**
Court of Appeals Hall
Eagle Street #20
Albany, NY 12207

Re: David Golia Paladin. Esq.

Dear Judge Wachtler:

Enclosed is a report prepared by my staff concerning the above-named attorney who submitted his voluminous file on two grievance matters to the Court of Appeals. The report is self-explanatory.

Mr. Paladin received two Letters of Caution in November 1988 and March 1989, respectively. He requested hearing on the first Letter of Caution and was accordingly served with a Statement of Charges. Mr. Paladin failed to submit an answer thereto, withdrew his request for a hearing, and instead, asked that the full Grievance Committee reconsider the sanction.

Upon further consideration, the first Letter of Caution was upheld by the Committee. Pursuant to § 691.6(a) of the Rules of the Appellate Division, Second Department, a Letter

of Caution is not defined as discipline. Such letters are issued when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment.

This Court apparently received an inquiry on these matters in or about January 1991, and the files from the Grievance Committee were reviewed. Unfortunately, we are unable at this time to ascertain the nature of said inquiry or its source.

Nevertheless, our review of this entire matter that Mr. Paladin was afforded complete due process with respect to this grievance matter. It was his choice not to proceed with a full factual hearing. There is no indication that the

Grievance Committee acted improperly in any manner with respect to the issuance of these Letters of Caution.

I hope the above information is satisfactory. If we can be of any further assistance to you, please feel free to let us know.

Very truly yours,

GUY JAMES MANGANO

Presiding Justice

pb Encl.

APPENDIX O

[DEPOSITION OF FRANK FINNERTY CHIEF COUNSEL 6/3/94]

investigation. It is the policy and the procedures of the committee to give the attorney notice

Q. So it is not Mr. Lawrence's charge?

A. It stems from his allegations that you had threatened him.

Q. Yes, but it is not his charge.

A. I think it is. I think it is his charge as well as the committee's.

Q. So you think it is his charge?

A. I think that Mr. Lawrence to this day, you know, felt -- I withdraw that.:

Q. Did Mr. Lawrence ever mention or raise an issue of being threatened by me?

A. Did he specifically?

Q. Yes.

A. I don't believe co.

Q. 80 he didn't make any specific complaint is what you're saying.

A. That's what I Just said.

Q. So, in effect, the letter of caution was issued sue sponte?

A. It is not a sue sponte complaint.

Q. Did they ever contact Mr. Lawrence and ask him if he felt threatened?

A. No.

Q. Did they ever ask or request an explanation from me prior to the issuance of the letter of caution?

A. You were given an opportunity to

F. Finnerty

contact -

A. There was no contact. To my knowledge there was no other contact with Mr. Lawrence.

Q. Outside of the three-page complaint filed by Mr. Lawrence, there was no contact?

A. In my reading of the file there was absolutely no response from him after the flurry of correspondence back and forth in the beginning

MR. DRINAN: I think Mr. Finnerty's testimony is when he received a copy of the letter that you had cent to Mr. Lawrence, the committee concluded, without any complaint from Mr. Lawrence, that the language and the tenure of that letter was improper.

A. Yes.

MR. DRINAN: And that Mr. Lawrence didn't initiate that particular aspect of the investigation, and he didn't complain about that letter; and that wan entirely the committee's responsibility.

A. They sent out the notice in May of 1988, which you never got.

Q. I never got it.

A. But the thing is that had you appealed, had you asked for review of the letter of caution with respect to the re-registration, the committee probably would have thrown it out. They would have dismissed the complaint, but there was never an appeal.

Q. Can you please give a definition of what a letter of caution is?
A. I can't.
Q. I'm sorry?

F. Finnerty
A. No. Again, there is no specific definition of a letter of caution. It is up to the -- after a committee reviews an investigation and the report, then they decide whether that warrants a caution or admonition.

Q. Is it considered disciplinary anywhere in the state?
A. What is that?
Q. A letter of caution.
A. That it is a disciplinary action, no
Q. It is not considered disciplinary anywhere in New York State?
A. No. It is considered a private sanction of the committee. And it cannot be used against any attorney unless he repeats the conduct.
Q. Is it kept on permanent file?
A. Yes.

Q. In matters of reconsideration or hearings, can those always be appealed?
A. A letter of caution is not appealable.
Q.A letter of caution in not appealable?
A.If the letter of caution stands,

there's no appeal from a letter
Q. Well, what recourse is available if reconsideration results in an affirmance of the initial determination?

A.But that's not the situation
Q.Okay, but -
A. That's fine.
Q. There is no recourse, that's it?
A. That's final. It is a final - again, it is not a disciplinary action.

Q. Is the attorney entitled to know all the evidence against him and its source?
A. With any complaint, the full complaint is sent to -- no matter how many times we get correspondence from the complainant, that is always provided to the attorney; and he may respond or not respond. And sometimes, many times, we get complaints that are so off the wall that, you know, we send it to the attorney only so that he has notice of what is going on, but the attorney will send back a letter saying, "I am not going to dignify this with an answer," which is an appropriate answer.
Q. But the attorney is entitled to know the information against him and the source?
A. Of course.
Q. Is the standard of proof used by the committee clear and convincing?
A. Again, I can't tell you what standards they use because it is up to 20 people. I think that -- I don't know. I don't think anybody could tell you that.

F. Finnerty

Q.So you don't know what the standard of proof is?
A. Upon which the committee bases its decision?
Q. Yes.
A. It could be reasonable doubt. It could be any standard that they use. They have complete authority. It is like a Jury. What standard do they use? They are not required to issue a -- to find such an occurrence by clear and convincing evidence. Even in a disciplinary case it is a fair preponderance of the credible evidence.
This is a civil proceeding, and that is the law of the land. The disciplinary proceeding against an attorney is a civil action, And,it is not criminal in any respect. And therefore, the burden of proof is a fair preponderance of the credible evidence.

A You have to understand that the attorney disciplinary process is truly a civil one. It's a highly ethical process that we have all attorneys in that system, whether you're a committee member or a staff member, you have to act in the most ethical fashion. And if we don't, we may as well close the doors; but the overwhelming number of complaints that are made against attorneys are unfounded. And it is our responsibility not to be a, quote, prosecutor, unquote; but it is really to do justice

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Q. But did they ever request an explanation from me specifically relating to those charges in that letter of caution?
A. I really don't know. I couldn't answer that. I mean, there's so much correspondence here that it would be almost

11 impossible for me to have knowledge of that

9 Q. I So that would explain why
10 Mr. Lawrence was never contacted about that?
11 A. There's certain self-evident things
12 or truths in life that you don't have to contact
13 somebody. You could pick up a letter and if a
14 letter is offensive or improper, you don't need
15 a -
16 Q. That would explain why -
17 A. You don't need a comment from
18 somebody if the letter is clearly -- they talk
19 about *ret mea*, that it is *res ispa loquitur*. The
20 letter speaks for itself.

APPENDIX P

[Letter of Appreciation from Petitioner's Client--the Person the Committee claims felt threatened by Petitioner--thanking Petitioner for Petitioner's Service]

P.O. Box 2071
Wilton, NY
11/10/87

David G. Paladin Esq.
P.O. Box 6
225 Horton Highway
Mineola L.I. New York 11501

Dear Sir:

I am in receipt of your letter dated 10-23-87; in response to your letter and Dr. Sauter evaluation, I am satisfied in your exertion in my appeal case.

Mr. Paladin, I've given this some thought for six months now, I would like very much for you David G. Paladin to drop the appeal case.

Oh yes! In Dr Sauter evaluation she seems to know her work, but, we all are entitled to our opinion, and I will state minds. In her divination of my future, I think she is a full of shit. In saying this sir it has nothing to do with impulsiveness. I'm going home in "June 88," so until now an then I will do what is needed to do in staying in our society. Thank you very much for your assistance.

Yours Trully,

Peter Lawrence